(23,760)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 203.

THE UNITED SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

AMERICAN FRUIT PRODUCT COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print
Caption	1	1
Transcript from the supreme court of the District of Columbia.	1	1
Declaration	1	1
Notice of trial	2	2
Particulars of demand	3	2
Affidavit of Walter S. Mountfort	3	3
Affidavit of William Foulds	4	4
Memoranda: Undertaking for security for costs approved and filed; bond in attachment in penalty of $22,000.00 approved and filed	5	4
Writ of attachment	5	5
Notice	6	5
Marshal's return	6	6
Schedule of levy	6	6

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	Original.	Print
Undertaking to release property attached	7	6
Pleas	7	7
Affidavit of Charles W. Semmes	12	12
Joinder in issue	14	14
Note of issue	14	14
Notice of trial	14	14
Verdict	15	14
Judgment	15	15
Memoranda: *Fi. fa.* issued and returned; attachment on judgment issued and returned	15	15
Motion to stay execution and vacate judgment	15	15
Affidavit of Charles W. Semmes	16	16
Edward B. Eynon, Jr.	17	17
R. Golden Donaldson	18	18
John J. Hamilton	20	20
M. J. Colbert	23	23
Order staying execution	26	25
Opinion of court	26	26
Order setting aside verdict and judgment as to United Surety Company	29	29
Objections to impaneling and swearing jury	29	29
Order overruling objection to swearing and impaneling jury	30	30
Verdict for plaintiff	31	31
Motion for arrest of judgment	31	31
Motion for judgment	32	33
Order overruling motion in arrest of judgment	33	33
Judgment	33	33
Appeal; time to submit exceptions and file transcript extended	34	34
Memoranda: $100 deposited by United Surety Company in lieu of bond on appeal; time to submit exceptions extended	34	35
Order making bill of exceptions part of record; time to file transcript of record further extended	35	35
Bill of exceptions	35	35
Objections to jury being sworn	35	35
Ruling of court	36	36
Testimony of G. N. Treble	37	37
Frederick Cusick	37	37
W. B. Robinson	39	39
Oscar J. Ricketts	43	43
R. Golden Donaldson	46	46
W. B. Robinson (recalled)	47	47
Chas. W. Semmes	49	49
Instructions requested by United Surety Company	51	51
Charge to jury	51	51
Assignment of errors	54	54
Designation of record	58	58
Clerk's certificate	59	59
Order of argument and submission	60	60
Opinion, Van Orsdel, J.	61	60

	Original.	Print
Judgment	64	64
Petition for a writ of error	65	64
Opinion, Van Orsdel, J., denying writ of error	68	66
Order denying writ of error	69	66
Motion for writ of error	70	67
Order overruling motion for writ of error	73	68
Writ of error	74	68
Bond on writ of error	75	69
Citation and service	76	70
Assignment of errors	77	70
Clerk's certificate	84	74

1 In the Court of Appeals of the District of Columbia.

No. 2480.

THE UNITED SURETY COMPANY, a Corporation, Appellant,
vs.
AMERICAN FRUIT PRODUCT COMPANY, a Corporation.

Supreme Court of the District of Columbia.

At Law. No. 50482.

AMERICAN FRUIT PRODUCT COMPANY, a Corporation Duly Organized under the — State of New York, Plaintiff,
vs.
THE SEMMES-KELLY COMPANY, a Corporation Incorporated under the Laws of the State of Virginia, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Declaration.

Filed April 22, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50482.

AMERICAN FRUIT PRODUCT COMPANY, a Corporation Duly Organized under the — State of New York, Plaintiff,
vs.
THE SEMMES-KELLY COMPANY, a Corporation Incorporated under the Laws of the State of Virginia, Defendant.

The plaintiff, "American Fruit Product Company" a corporation duly incorporated under the laws of the State of New York, sues the defendant "The Semmes-Kelly Company" a corporation duly
2 incorporated under the laws of the State of Virginia, and having an office and an agent in the City of Washington, District of Columbia, and doing business in said City and District, for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for work done and materials provided by the plaintiff for the defendant at its request,

and for money loaned by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant at its request, and for money found to be due from the defendant to the plaintiff on accounts stated between them, and the plaintiff claims the sum of Ten Thousand five hundred and ninety-six dollars and forty-five cents ($10,596.45) with interest on $488.36 from December 30, 1907; and with interest on $487.10 from December 14, 1907; and with interest on $503.82 from February 2, 1908; and with interest on $297.36 from March 2, 1908; and with interest — $250.43 from March 2, 1908; and with interest on $426.72 from March 2, 1908; and with interest on $427.77 from March 4, 1908; and with interest on $849.67 from March 6, 1908; and with interest on $428.08 from March 7, 1908; and with interest on $430.71 from March 8, 1908; and with interest on $509.17 from March 9, 1908; and with interest on $429.45 from March 13, 1908; and with interest on $431.76 from March 14, 1908; and with interest on $427.35 from March 15, 1908; and with interest on $320.71 from March 19, 1908; and with interest on $285.60 from March 19, 1908; and with interest on $2,493.75 from March 29, 1908; and with interest on $553.44 from April 2, 1908; and with interest on $555.20 from April 3, 1908, besides costs of this suit, according to the particulars of demand hereto attached.

M. J. COLBERT,
Attorney for Plaintiff.

Notice of Trial.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays occurring after the day of service hereof; otherwise judgment.

M. J. COLBERT,
Attorney for Plaintiff.

3 *Particulars of Demand.*

The Semmes-Kelly Company to American Fruit Product Company, Dr.

					Gals.		
1907.							
Nov. 9	100	bbls.	Fortified Juice.....		4651	.10½	$488.36
14	100	"	" "		4639	.10½	487.10
1908.							
Jan. 31	65	"	cider vinegar.....		3089	.13½	417.02
	20½	"	" "		560	.15½	86.80
Feb. 1	60	"	" "		2832	.10½	297.36
	40	"	cider vgr.....		1855	.13½	250.43
	87	"	fortified juice		4064	.10½	426.72
3	87	"	" "		4074	.10½	427.77
5	87	"	" "		4071	.10½	427.46
	87	"	" "		4021	.10½	422.21
6	87	"	" "		4077	.10½	428.08
7	87	"	" "		4102	.10½	430.71
8	57	"	" "		2693	.10½	282.77

	8	30	"	dry R. cider	1415	.16	226.40
	12	87	"	fortified Juice.....	4090	.10½	429.45
	13	87	"	" "	4112	.10½	431.76
	14	87	"	" "	4070	.10½	427.35
	18	20	"	Crab. Cider.....	953	.19	181.07
		20	"	Cider Vgr.....	963	.14½	139.64
		40	"	" "	1904	.15	285.60
	28	50	"	Dry R. Cider	2336	.16	373.76
		25	"	Boiled "	1194	.75	895.50
		75	"	Cider Vgr...	3555	.15	533.25
		50	"	" 4 % "	2332	.14½	338.14
		50	"	" 4½ % "	2354	.15	353.10
Mar.	2	75	"	Dry R. Cider.....	3459	.16	553.44
	3	75	"	" " "	3470	.16	555.20
							$10,596.45

Affidavit of Walter S. Mountfort.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, a Notary Public in and for said District, Walter S. Mountfort, who being first duly sworn deposes and says that he is a citizen of the United States, and a resident of the City of Rochester, New York, and has personal knowledge of the matters and things herein contained; that he is the secretary of the corporation known as the American Fruit Product Company, the person named as plaintiff in the foregoing and annexed declaration, which he refers to and expressly makes part of this affidavit. That the said American Fruit Product Company has a just right
4 of recovery from the Semmes-Kelley Company, a corporation, the person named as defendant in said declaration, as follows: On various dates between the 9th day of November, 1907, and the 3rd day of March, 1908, both inclusive, the said American Fruit Product Company sold and delivered to the said The Semmes-Kelly Company merchandise particularly set out and specified in the Particulars of Demand annexed to said declaration, which Particulars of Demand are expressly made part of this affidavit, of the just and reasonable value of $10,596.45, which was also the price agreed to be paid for said merchandise by the said The Semmes-Kelly Company. That said goods were actually sold and delivered to the said The Semmes-Kelly Company by the American Fruit Product Company, and the prices charged therefor are just and reasonable, and the affiant says that there is justly due to the American Fruit Product Company from the said The Semmes-Kelly Company the full sum of $10,596.45, exclusive of all set-offs and just grounds of defense.

Affiant further says that the said The Semmes-Kelly Company is a foreign corporation, to wit, a corporation organized and created under the laws of the State of Virginia, and is not a resident of the District of Columbia.

WALTER S. MOUNTFORT.

Subscribed and sworn to before me this 15th day of April, A. D. 1908.

[SEAL.] EDMUND BRADY,
Notary Public, D. C.

Affidavit of William Foulds.

STATE OF NEW YORK,
County of Monroe, To wit:

Personally appeared before me, a Notary Public in and for said District, William Foulds, who being first duly sworn, deposes and says that he is a citizen of the United States, and a resident of the City of Rochester, New York, and has personal knowledge of the matters and things herein contained; that he is the assistant secretary of the corporation known as the American Fruit Product Company, the person named as plaintiff in the foregoing and annexed declaration, which he refers to and expressly makes part of this affidavit. That the said American Fruit Product Company has a just right of recovery from The Semmes-Kelly Company, a corporation, the person named as defendant in said declaration, as follows: On various dates between the 9th day of November, 1907, and the 3rd day of March, 1908, both inclusive, the said American Fruit Product Company sold and delivered to the said The Semmes-Kelly Company merchandise particularly set out and specified in the Particulars of Demand annexed to said declaration, which Particulars of Demand are expressly made a part of this affidavit, of the just and reasonable value of $10,596.45, which was also the price agreed to be paid for said merchandise by the said The Semmes-Kelly Company. That said goods were actually sold and delivered to the said The Semmes-Kelly Company by the American Fruit Product Company, and the prices charged therefor are just and reasonable, and the affiant says that there is justly due to the American Fruit Product Company from the said The Semmes-Kelly Company the full sum of $10,596.45, exclusive of all set-offs and just grounds of defense.

Affiant further says that the said The Semmes-Kelly Company is a foreign corporation, to wit, a corporation organized and created under the laws of the State of Virginia, and is not a resident of the District of Columbia.

WILLIAM FOULDS.

Subscribed and sworn to before me this 16th day of April, A. D. 1908.

[SEAL.] ANDREW VAN DYCK,
Notary Public in and for the County of Monroe and State of New York.

Memoranda.

April 22, 1908.—Undertaking for security for costs approved and filed.

Bond in Attachment in penalty of $22,000.00 approved and filed.

Writ of Attachment.

Issued April 22, 1908.

* * * * * * *

The President of the United States to the Marshal for said District, Greeting:

You are hereby commanded to attach, seize, and take into your custody the defendant's lands and tenements, property, and credits which shall be found in this District, to the value of $10,596.45, with interest on $488.36 fr. Dec. 30, '07; on $487.10 fr. Dec. 14, '07; on $503.82 fr. Feb. 2, '08; on $297.36 fr. Mar. 2, '08; on $250.43 fr. Mar. 2, '08; on $426.72 fr. Mar. 2, '08; on $427.77 fr. Mar. 4, '08; on $849.67 fr. Mar. 6, '08; on $428.08 fr. Mar. 7, '08; on $430.71 fr. Mar. 8, '08; on $509.17 fr. Mar. 9, '08; on $429.45 fr. Mar. 13, '08; on $431.76 fr. Mar. 14, '08; on $427.35 fr. Mar. 15, '08; on $320.71 fr. Mar. 19, '08; on $285.60 fr. Mar. 19, '08; on $2,493.75 fr. Mar. 29, '08; on $553.44 fr. Apr. 2, '08; on $555.20 fr. Apr. 3, '08; being the amount of the plaintiff's demand against the defendant, as shown by the affidavits, duly supported and filed, and claimed in the declaration; and the further sum of $50.00, for the costs and charges which may accrue in the premises; and the same, so attached, safely keep, subject to the orders of the Court, unless the defendant or the person in whose possession the property is attached, deliver to you, to be filed herewith, his undertaking, with sufficient surety
6 or sureties, to abide by and perform the judgment of the Court in relation to said property. And should you attach the defendant's property or credits in the possession of any other person or persons than the defendant you shall notify such person or persons of such seizure by virtue of this Writ of Attachment, and serve a notice upon him or them, as well as on said defendant, to appear in said court on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the service of said notice, to show cause, if any there be, why the property or credits so attached should not be condemned and execution thereof had.

Witness, The Honorable Harry M. Clabaugh, Chief Justice of said Court, the 22d day of April, A. D. 1908.

[SEAL.]

J. R. YOUNG, *Clerk*,
By H. BINGHAM,
Assistant Clerk.

Notice.

APRIL 22, 1908.

To the Semmes Kelly Company, Defendant; —— ——, Garnishee:

You are hereby notified to appear in the Supreme Court of the District of Columbia on or before the twentieth day, exclusive of Sundays and legal holidays, after service hereof, and show cause, if any there be, why the property, credits, of the said defendant, seized by virtue of the aforegoing Writ of Attachment in the hands of ——

—— Garnishee, (of which seizure the said garnishee is hereby notified), should not be condemned and execution thereof had.

AULICK PALMER,
U. S. Marshal.

S.

Marshal's Return.

Attached as per schedule herewith and served defendant with a copy of this Writ and Notice prescribed by Section 446 of the Code. April 22, 1908.

AULICK PALMER,
U. S. Marshal.

S.

Released on bond April 23, 1908.

Schedule of Levy.

* * * * * * *

Schedule of Levy under Writ of Attachment.

Large stock of merchandise, groceries, canned goods etc. located at store—premises No. 614-616 Penn. Ave.—valued at $20,000.

We, the undersigned, citizens of the District of Columbia, having been duly summoned and sworn by the Marshal of said Dis-
7 trict, do hereby certify that we have appraised the property described in the foregoing schedule at — Dollars.

Given under our hands and seals, this — day of ——, 190–.

—— ——. [SEAL.]
—— ——. [SEAL.]

Undertaking to Release Property Attached.

Filed April 23, 1908.

* * * * * * *

The defendant, and United Surety Company of Baltimore, Md., surety, in consideration of the discharge from the custody of the Marshal of the property seized by him, upon the attachment sued out against the defendant, on the 22 day of April, A. D. nineteen hundred and Eight, in the above-entitled cause, appear, and submitting to the jurisdiction of the Court, hereby undertake, for themselves and each of them, their and each of their heirs, executors and administrators, successors or assigns, to abide by and perform the judgment of the Court in the premises in relation to said prop-

erty, which judgment may be rendered against all the parties whose names are hereto subscribed.

Signed this 23 day of April, A. D. 1908.

THE SEMMES KELLY CO. [SEAL.]
CHAS. W. SEMMES, *President.* [SEAL.]
UNITED SURETY CO., [SEAL.]
By OSCAR J. RICKETTS, *Agent.*
R. GOLDEN DONALDSON, *Att'y in Fact.*

This undertaking is satisfactory.

M. J. COLBERT,
For Plaintiff.

Approved this — day of ——, 190–.

Pleas.

Filed May 19, 1908.

* * * * * * *

Now comes the defendant, by its attorneys, Douglas, Baker and Sherrill, and for a plea to the declaration in the above entitled cause, says that it never promised in manner and form as in said declaration alleged.

2. And for a further plea to said declaration, the defendant says that it is not indebted in manner and form as in said declaration alleged.

3. And for a further plea to said declaration, the defendant says that the plaintiff, at the commencement of this suit, was and
8 still is, indebted to the defendant in the sum of $1,304.68, for that the defendant, heretofore, to wit, in the months of September and October, 1906, was and from thence hitherto has been and still is a wholesale grocer, engaged in the selling to various customers in the Southern States and elsewhere divers articles usually sold by retail grocers and other merchants, including cider and vinegar; and the defendant says that on, to wit, the 25th day of September, 1906, the plaintiff, in consideration of the promise and agreement by the defendant to order, receive and pay for the same in accordance with the prices and terms hereinafter stated, promised and agreed with the defendant to sell and deliver to the defendant 2,500 whiskey barrels of fortified juice at nine and one-half cents per gallon, said price to be f. o. b. the mill of the plaintiff, and to be subject to a special allowance to the defendant of one cent per gallon, the fortifier to be furnished by the defendant, and the said 2,500 barrels of fortified juice to be taken out of the mill of the plaintiff on or before October 1, 1907; and the defendant says that on, to wit, the 4th day of October, 1906, the plaintiff, in consideration of the promise and agreement by the defendant to order, receive and pay for the same in accordance with the prices and terms hereinafter stated,

promised and agreed with the defendant to sell and deliver to the defendant 500 additional whiskey barrels of fortified juice at nine and one-half cents per gallon, the said price to be f. o. b. the mill of the plaintiff and to be subject to a special allowance to the defendant of one cent per gallon, the fortifier to be furnished by the defendant, and the said 500 barrels of juice to be taken out of the mill of the plaintiff on or before October 1, 1907. And the defendant says that at divers times between the said 25th day of September, 1906, and said 1st day of October, 1907, the plaintiff sold and delivered to the defendant, of said 3,000 barrels of fortified juice so as aforesaid agreed to be sold and delivered to it by the plaintiff, 1,595 barrels, containing 74,054 gallons of said fortified juice, or an average of 46.43 gallons per barrel; and the defendant says that before and on the 1st day of October, 1907, the defendant requested, ordered and directed the plaintiff to sell and deliver to it the balance of said 3,000 barrels of said fortified juice, to wit, 1,405 barrels, but the plaintiff failed and refused so to do, and although the time within which the plaintiff agreed to deliver said 1,405 barrels of fortified juice has long since elapsed, and although the defendant has always been ready and willing to accept and receive the said 1,405 barrels, yet the plaintiff did not, nor would within the time aforesaid, or at any time afterwards, deliver to the defendant the said 1,405 barrels of said fortified juice, but wholly neglected and refused so to do; and the defendant says that in order to supply its trade, and because of the failure and refusal of the plaintiff to sell and deliver to it the said 1,405 barrels of said fortified juice, the defendant was obliged and compelled to purchase 1,405 other barrels of similar fortified juice at ten and one-half cents per gallon, an advance of two cents per gallon over the price for which the plaintiff agreed to sell and deliver the said fortified juice to the defendant.

Wherefore the defendant claims damages from the plaintiff
9 in the sum of $1,304.68, and it is willing that said sum may be set off against the plaintiff's demand.

4. And for a further plea to said declaration, the defendant says that the plaintiff, at the commencement of this suit, was, and still is, indebted to the defendant in the further sum of $952, with interest thereon from November 17, 1905, for money before that time had and received by the plaintiff to the use of the defendant, for that on, to wit, the 13th day of September, 1905, the plaintiff agreed to sell to the defendant and the defendant agreed to buy from the plaintiff, 1,500 barrels of apple juice, at fourteen cents per gallon, the same to be ordered by the defendant from time to time, between the 1st day of October, 1905, and the 1st day of October, 1906, 1,000 barrels of said juice to have sugar added by the plaintiff at the rate of 50 pounds to the barrel, said sugar to be paid for by the defendant as soon as used. And the defendant says that on the 6th day of November, 1905, the plaintiff rendered to the defendant a bill for $2,380, being for 50,000 lbs. of sugar, at $.0476 per pound, which the plaintiff alleged it had purchased and used in said 1,000 barrels of juice; and the defendant, relying on the representation of the plaintiff that it had purchased said 50,000 pounds of

sugar at said price, and used the same in said 1,000 barrels of juice, and believing said representation to be true, paid to the plaintiff, on the 17th day of November, 1905, the said sum of $2,380, less $23.80 discount, for said sugar. And the defendant says that the plaintiff did not purchase and use in said 1,000 barrels of juice aforesaid, or for any other purpose of the defendant, 50,000 pounds of sugar, but purchased and used but 30,000 pounds of sugar, at the price of $.0476 per pound. And the defendant says that by reason of the premises the plaintiff became indebted to the defendant in the sum of $952, with interest thereon from November 17, 1905, and being so indebted, the plaintiff, in consideration thereof, afterward, to wit, on the 18th day of November, 1905, promised the defendant to pay to it the said sum of $952, with interest thereon from November 17, 1905, when it, the plaintiff, should be thereunto afterwards requested; but the defendant says that the plaintiff, not regarding its said promise, has not as yet paid the said sum and interest, or any part thereof, although often requested by the defendant so to do, but the said plaintiff has hitherto wholly neglected and refused and still does neglect and refuse to pay the same. Wherefore the defendant claims from the plaintiff the sum of $952, with interest thereon from November 17, 1905, and it is willing that said sum may be set off against the plaintiff's demand.

5. And for a further plea to said declaration, the defendant says that the plaintiff, at the commencement of this suit, was, and still is, indebted to the defendant in the further sum of $238, with interest thereon from January 20, 1906, for money before that time had and received by the plaintiff to the use of the defendant, for that on, to wit, the 2nd day of January, 1906, the plaintiff agreed to sell to the defendant and the defendant agreed to buy from the plaintiff 250 barrels of apple juice, at fourteen cents per gallon, the same to be ordered by the defendant from time to time prior to the 1st day of October, 1906, said juice to have sugar added by the plaintiff at the rate of 50 pounds to the barrel, said sugar to be paid for by the defendant as soon as used, and the defendant says that on the 17th day of January, 1906, the plaintiff rendered to the defendant a bill for $595, being for 12,500 pounds of sugar, at $.0476 per pound, which the plaintiff alleged it had purchased and used in said 250 barrels of juice; and the defendant, relying on the representation of the plaintiff that it had purchased said 12,500 pounds of sugar at said price and used the same in said 250 barrels of juice, and believing said representation to be true, paid to the plaintiff on the 20th day of January, 1906, the said sum of $595, less $5.95 discount, for said sugar. And the defendant says that the plaintiff did not purchase and use in said 250 barrels of juice, or for any other purpose of the defendant, 12,500 pounds of sugar, put purchased and used but 7,500 pounds of sugar, at the price of $.0476 per pound. And the defendant says that by reason of the premises the plaintiff became indebted to the defendant in the sum of $238, with interest thereon from January 20, 1906, and being so indebted, the plaintiff, in consideration thereof, afterwards, to wit, on the 21st day of January, 1906, promised the defendant to pay to it the said sum of

$238, with interest thereon from January 20, 1906, when it, the plaintiff, should be thereunto afterwards requested; but the defendant says that the plaintiff, not regarding its said promise, has not as yet paid the said sum and interest, or any part thereof, although often requested by the defendant so to do, but the said plaintiff has hitherto wholly neglected and refused and still does neglect and refuse to pay the same. Wherefore the defendant claims from the plaintiff the sum of $238, with interest thereon from January 20, 1906, and it is willing that said sum may be set off against the plaintiff's demand.

6. And the defendant, for a further plea to said declaration, says that the plaintiff, at the commencement of this suit, was, and still is, indebted to the defendant in the further sum of $3,120.12 with interest thereon from October 8, 1906, for money before that time had and received by the plaintiff to the use of the defendant, for that on, to wit, the 25th day of September, 1906, the plaintiff agreed to sell to the defendant and the defendant agreed to buy from the plaintiff, 2,500 barrels of fortified juice at eight and one-half cents per gallon net, and on, to wit, the 4th day of October, 1906, the plaintiff agreed to sell to the defendant and the defendant agreed to buy from the plaintiff 500 additional barrels of said fortified juice at eight and one-half cents per gallon net, all of said 3,000 barrels to be ordered by the defendant on or before October 1, 1907, said 3,000 barrels of juice to have sugar added by the plaintiff at the rate of 50 pounds to the barrel, said sugar to be paid for by the defendant as soon as used. And the defendant says that on the 8th day of December, 1906, the plaintiff rendered to the defendant a bill for $7,399.35, being $3,716.25 for 75,000 pounds of sugar at $.0495½ per pound, and for $3,573.75 for 75,000 pounds of sugar at $.0476½ per pound, and for $109.35 interest on said sums from October 8 to December 8, 1906, which said sugar the plain-
11 tiff alleged it had purchased on October 8, 1906, and used in said 3,000 barrels of juice. And the defendant, relying on the representation of the plaintiff that it had purchased said 150,000 pounds of sugar at said prices and used the same in said 3,000 barrels of juice, and believing the same to be true, paid to the plaintiff on the 16th day of January, 1907, the sum of $3,399.35 on account said bill of $7,399.35, and on the 7th day of February, 1907, paid to the plaintiff the balance of $4,000 of said bill. And the defendant says that the plaintiff did not purchase and use in said 3,000 barrels of juice, or for any other purpose of the defendant, 150,000 pounds of sugar, but purchased and used but 85,800 pounds of sugar, at the average price of $.0486 per pound, amounting to $4,169.88 in all. And the defendant says that by reason of the premises the plaintiff became indebted to the defendant in the sum of $3,120.12, with interest thereon from October 8, 1906, and being so indebted, the plaintiff, in consideration thereof, afterwards, to wit, on the 8th day of February, 1907, promised the defendant to pay to it the said sum of $3,120.12, with interest thereon from October 8, 1906, when it, the plaintiff, should be thereunto requested; but the defendant says that the plaintiff, not regarding its said promise, has not as yet paid

the said sum and interest, or any part thereof, although often requested by the defendant so to do, but the said plaintiff has hitherto wholly neglected and refused and still does neglect and refuse to pay the same. Wherefore the defendant claims from the plaintiff the sum of $3,120.12 with interest thereon from October 8, 1906 and it is willing that said sum may be set off against the plaintiff's demand.

7. And for a further plea to said declaration, the defendant says that the plaintiff, at the commencement of this suit, was, and still is, indebted to the defendant in further sum of $139.50, for money paid by the defendant to the use of plaintiff for that, on to wit, the 9th and 14th days of November, 1907, plaintiff shipped to the defendant from its mills 135 barrels purporting to contain fortified apple juice, said barrels bearing the label or brand affixed by plaintiff, "Apple Cider;" and the defendant says that when the cars containing said 135 barrels arrived in Washington, the defendant, not knowing that the same were not properly labeled or branded, paid to the Baltimore and Ohio railroad company the sum of $126.00 for freight thereon, and also paid the further sum of $13.50 drayage for hauling said 135 barrels from the car to the defendant's warehouse. And the defendant says that very soon after said 135 barrels were taken from the car in which they were shipped and placed in its warehouse, to wit, on the 22d day of November, 1907, said 135 barrels and their contents were seized by the Marshal of the District of Columbia and taken into his possession and custody upon a warrant of arrest issued out of the Supreme Court of the District of Columbia, upon a libel filed by the United States, alleging that said 135 barrels and their contents were misbranded in violation of the Food and Drugs Act of June 30, 1906; and the defendant further says that thereafter such proceedings were had in said case, that on
12 the 10th day of February, 1908, the court passed a decree therein, adjudging that said 135 barrels with their contents were misbranded in violation of the Act aforesaid and condemning said 135 barrels with their contents to be confiscated to the government and disposed of by sale; but it was provided in said order that if the defendant should pay all costs of the proceedings and should give a bond to the United States not to dispose of said 135 barrels and their contents, contrary to the provisions of said Act of June 30, 1906, then said barrels and contents, instead of being sold, should be released, and the defendant further says that thereafter, to wit, on the 28th day of February, 1908, it executed the bond required in said order, in order to prevent the sale of said goods, and that thereupon said 135 barrels were released from the custody of the Marshal, and were immediately thereafter returned by the defendant to the plaintiff at Rochester, N. Y. And the defendant says that by reason of the premises the plaintiff became indebted to the defendant in the sum of $139.50, and being so indebted, the plaintiff, in consideration thereof, afterward, to wit, on the 10th day of February, 1908, promised the defendant to pay to it the said sum of $139.50 when it, the plaintiff, should be thereunto requested, but the defendant says that the plaintiff, not re-

garding its said promise, has not as yet paid the said sum or any part thereof, although often requested by the defendant so to do, but the said plaintiff has wholly neglected and refused and still neglects and refuses to pay the same.

Wherefore the defendant claims from the plaintiff the sum of $139.50 and it is willing that said sum shall be set off against the plaintiff's demand.

DOUGLAS, BAKER & SHERRILL,
Att'ys for Defendant.

Affidavit of Defense.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Charles W. Semmes, being first duly sworn, on oath deposes and says that he is the President of the Semmes-Kelly Company, the defendant named in the declaration in the above entitled cause, and that he makes this affidavit on behalf of the said Company; that said defendant has a good defense to the plaintiff's claim to the amount of $663.18, and also has just claims of set off against the demand of the plaintiff amounting to $5,754.30, with interest on $952 from November 17, 1905, and with interest on $238 from January 20, 1906, and with interest on $3,120.12 from October 8, 1906, which are due and owing to the defendant from the plaintiff, and that defendant is willing that its said claims may be set off against the plaintiff's demand.

The facts constituting the defendant's defense, amounting to $663.18, to the plaintiff's claim are as follows: Of the 200 barrels of fortified juice, containing 9290 gallons at ten and one-half cents per gallon, charged in the particulars of demand filed by the plaintiff with its declaration as having been sold and delivered to the defendant by the plaintiff on the 9th and 14th days of No-
13 vember, 1907, affiant says that 135 barrels of the same containing 6316 gallons, were seized and confiscated by the Government of the United States because said barrels were each misbranded or mislabeled by the plaintiff in violation of the provisions of the act of Congress of June 30, 1906, known as the "Food and Drug Act." Said 135 barrels arrived in Washington on or about the 19th day of November, 1907, bearing the brand or label, affixed by the plaintiff, "Apple Cider." Said 135 barrels were removed a day or two thereafterwards from the cars in which the same were shipped to the warehouse of the defendant, and a very short time after the same were placed in the defendant's warehouse, on, to wit, the 22nd day of November, 1907, a libel was filed in the Supreme Court of the District of Columbia, wherein the seizure and condemnation of the said 135 barrels and their contents was prayed on the ground that said barrels were, in violation of the act of June 30, 1906, branded "Apple Cider" when, in fact, as said libel alleged, they contained a mixture or compound of fermented sugar and fermented apple juice. Upon the filing of said libel, a warrant was

issued for the arrest of said goods and on the same day the said 135 barrels were seized by the Marshal of the District of Columbia and taken into his custody and possession. Said cause is known as No. 752 on the District Court Docket of the Supreme Court of the District of Columbia. Thereafter such proceedings were had in said cause that on the 10th day of February, 1908, a decree was passed by the court adjudging that said 135 barrels, with their contents, were misbranded, in violation of the act of Congress aforesaid, and condemning said 135 barrels with their contents to be confiscated to the Government and disposed of by sale, but it was provided in said order that if the defendant would pay all of the costs of the proceedings and would give a bond to the United States not to dispose of the said 135 barrels and their contents contrary to the provisions of the act of June 30, 1906, then that said barrels and their contents, instead of being sold, should be released. Thereafterwards, on, to wit, the 28th day of February, 1908, the defendant herein executed the bond required in said order, in order to prevent the sale of said goods, and thereupon the Marshal released said goods from custody and immediately the defendant herein caused the same to be returned to the plaintiff at Rochester, New York. Affiant therefore denies that the defendant has accepted from the plaintiff said 135 barrels, containing 6316 gallons, and says that the said defendant is not liable to the plaintiff for the price thereof.

The defendant's claims of set off against the plaintiff's demand are based on the facts set forth in its third, fourth, fifth, sixth and seventh pleas filed herein (which pleas are hereby referred to and made a part hereof, which said facts affiant says are true, except as to the allegations in said fourth, fifth, sixth and seventh pleas, of promises by the plaintiff to pay the several sums claimed in said pleas, respectively, which said promises affiant is advised are implied by the law from the facts stated in said pleas. Affiant says
14 that the allegations in said fourth, fifth and sixth pleas as to the quantities of sugar actually purchased and used by the plaintiff in the juice sold and delivered to the defendant are not matters within his personal knowledge, but he is informed and believes that said allegations are true and the defendant expects to be able to prove the same at the trial of this cause. And affiant says that there is justly due to the Semmes-Kelly Company from the American Fruit Product Company the sum of $5,754.30, with interest on $952 from November 17, 1905, and with interest on $238 from January 20, 1906, and with interest on $3,120.12 from October 8, 1906.

CHAS. W. SEMMES.

Subscribed and sworn to before me this 18 day of May, 1908.

[SEAL.] WM. B. MATTHEWS, JR.,
Notary Public, D. C.

Joinder in Issue.

Filed June 12, 1908.

* * * * * * *

The plaintiff joins issue on the pleas of the defendant filed herein.

HAMILTON, COLBERT,
YERKES & HAMILTON,
Attorneys for Plaintiff.

Note of Issue.

Filed June 12, 1908.

* * * * * * *

Hamilton, Colbert, Yerkes and Hamilton, Attorneys for Plaintiff.

Douglas, Baker and Sherrill, Attorneys for Defendant.

Last pleading filed herein June 12, 1908.

Notice of Trial.

That Clerk will please calendar above-entitled cause for trial at the next term of court.

HAMILTON, COLBERT,
YERKES & HAMILTON,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

Thursday, May 19th, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

15 Comes now as well the plaintiff by its attorneys of record, as the defendant by Mr. E. Wilson, and a jury of good and lawful men of this District, to wit: George E. Reed, Arthur A. Chapin, Nicholas R. Grimm, Wm. P. Seymour, R. Lee Horton, Burr N. Edwards, Chas. W. Cheek, Dornin Ellis, Lewis S. Collins, Edward C. Woody, Lee L. Herrell and Paul Libel, who are duly sworn to well and truly try the issues herein joined, and being given the case in charge, upon their oath say they find herein in favor of the plaintiff and that the money payable by said defendant to said plaintiff by reason of the premises is the sum of Eight Thousand Seven Hundred and Forty-eight Dollars and twenty-nine cents ($8,748.29) with interest thereon from the 9th day of November, 1907.

Wednesday, May 25th, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

It appearing that under the Rule of Court judgment on verdict should be entered herein, it is so ordered; wherefore, it is considered, that the plaintiff herein recover of defendant herein and the United Surety Company of Baltimore, Md., its surety, the sum of Twenty Thousand Dollars ($20,000.00) appraised value of the property herein attached, and upon payment by said defendant and its surety, to said plaintiff of the sum of Eight Thousand Seven Hundred and Forty-eight Dollars and twenty-nine cents ($8,748.29), together with interest thereon from the 9th day of November, 1907, as aforesaid found due by said defendant to said plaintiff, by reason of the premises, and costs of suit, for which execution shall be had; it is ordered that the Undertaking filed herein April 23d, 1908, be discharged and released.

Memoranda.

August 16, 1910.—Fi. fa. issued and returned "Nulla bona" on October 15, 1910.

August 30, 1910.—Attachment on Judgment issued and returned August 30, 1910 "Attached credits in the hands of Oscar J. Ricketts — Edward B. Eynon, Jr., August 31, 1910."

Motion to Stay Execution and Vacate Judgment.

Filed September 7, 1910.

* * * * * * *

Comes now the United Surety Company by R. Golden Donaldson, its attorney, and moves the court to stay execution upon, and vacate, the judgment entered against it in this cause on the 25th day of May, 1910, on the following grounds to wit:

First. That the said cause was advanced for trial without any notice to or consent of the United Surety Company, and with
16 no opportunity to defend the same to the serious prejudice of the United Surety Company.

Second. That no legal evidence was introduced at the alleged trial of said cause to prove the claim of the plaintiff against the defendant.

Third. That the alleged trial was had without any notice to the United Surety Company, and without giving the said company an opportunity to appear and defend said cause and protect its interest in the premises.

Fourth. That the judgment entered in this cause was obtained without any trial of the cause on its merits or according to law, and only by consent of the attorney for the plaintiff, and attorney for the trustee in bankruptcy of the defendant, all without any notice to

the United Surety Company, the surety on the attachment undertaking filed in this cause, or opportunity given said last mentioned company to appear and defend said cause and protect its interest.

Fifth. That the said judgment is not valid and binding according to law as against the said United Surety Company.

R. GOLDEN DONALDSON,
Att'y United Surety Co.

Messrs. Hamilton, Colbert, Yerkes & Hamilton, Attorneys for the Plaintiff:

Please take notice that on Friday, September 2nd, 1910, at ten o'clock A. M. or as soon thereafter as counsel can be heard the foregoing motion will be presented to the court for its action thereon.

R. GOLDEN DONALDSON,
Att'y United Surety Co.

Affidavit of Charles W. Semmes.

Filed September 7, 1910.

* * * * * * *

DISTRICT OF COLUMBIA, *To wit:*

Charles W. Semmes, being first duly sworn, deposes and says that he is a citizen of the United States and resident of the District of Columbia; that up to the 23rd day of June, 1909, when the defendant corporation was adjudged a bankrupt he was its president, and had been for six years; he was in personal and active charge of the business of the defendant corporation up to the time of its adjudication as aforesaid, and knows of his own personal knowledge all the facts relating to dealings between the plaintiff and the defendant corporation, and states that the claim of the plaintiff is not just and owing from the defendant corporation to the plaintiff, nor did the defendant corporation owe the plaintiff the sum of $8,748.29, and your affiant states that the claim of the plaintiff against the defendant corporation as set out in the declaration filed in this cause should be reduced by the sum of $5.754.30 as set out in the pleas and affidavits of defense which he, as president of the
17 said defendant corporation swore to, and filed to the declaration filed herein, and affiant further states that if the said case should be tried upon its merits he is prepared to produce competent proof to prove his statements.

Affiant attaches hereto a copy of the pleas and affidavit of defense so as aforesaid sworn to, and filed by him, and makes the same a part of this affidavit, and reiterates the absolute truth of the statements therein made, and swears to the truth of the statemens therein made as if they were set out in this affidavit in hec verga.

Affiant further states that he had no notice of any kind or character from any source whatever that the attorney for the trustee in bankruptcy for the defendant corporation had agreed that the plaintiff might take a consent verdict against the defendant corporation

for the sum of $8,748.29, and that he received no notice that it had been done until about the last part of June, 1910, when he was informed by R. Golden Donaldson, attorney for the United Surety Company that said consent verdict had been rendered, and judgment entered thereon.

Affiant further states that if he had known of the agreement that said consent verdict should be taken that he would have protected against the same as being unjust, and being in an amount far in excess of what was due the plaintiff; affiant further states that if he had been called upon by the trustees in bankruptcy or his attorney that he would have advised him of the defense to said claim.

Affiant further states that if the judgment in this case is set aside he will lend his assistance to the United Surety Company in their defense to the suit.

CHAS. W. SEMMES.

Subscribed and sworn to before me this 5th day of September 1910.

[SEAL.] ANNA M. BOSSE,
Notary Public, D. C.

Affidavit of Edward B. Eynon, Jr.

* * * * * * *

DISTRICT OF COLUMBIA, *To wit:*

Edward B. Eynon, Jr., being first duly sworn, deposes and says that he is a citizen of the United States and resident of the District of Columbia; that he is a member of the firm of Ricketts & Eynon, local agents of the United Surety Company, in the District of Columbia; that he is well acquainted with Messrs. Hamilton, Colbert, Yerkes & Hamilton, counsel for the plaintiff in this case, and that said counsel well knew the fact that Ricketts & Eynon were and are the agents of the United Surety Company, and had held communications with them in reference to the claim but that said counsel did not give said Ricketts & Eynon, or either member of said firm, any notice or warning of any kind or character that the above
18 entitled case was to be called or tried, or that a verdict by consent or otherwise was to be rendered in this case, and that the first knowledge they had of the rendition of the verdict and entry of the judgment in this case was when they were informed of the same by R. Golden Donaldson, counsel for the company, a short time after said verdict had been rendered.

EDWARD B. EYNON, JR.

Subscribed and sworn to before me this 5th day of September 1910.

[SEAL.] ANNA M. BOSSE,
Notary Public, D. C.

Affidavit of R. Golden Donaldson.

* * * * * * *

DISTRICT OF COLUMBIA, *To wit:*

R. Golden Donaldson, being first duly sworn, deposes and says that he is a citizen of the United States, a resident of the District of Columbia, a member of the Bar practicing before this Honorable Court, and is the attorney and agent in the District of Columbia for the United Surety Company.

The United Surety Company is a corporation organized under the laws of the State of Maryland, and its business is that of becoming surety upon bonds and undertakings required in judicial proceedings; that on the 22nd day of April, 1908, the plaintiff filed its declaration against the defendant in this case, and thereafter sued out its writ of attachment, and thereunder seized certain property of the defendant, and subsequently on the 23 day of April, 1908, the United Surety Company became surety upon the attachment undertaking filed in this case, and the goods of the defendant were thereupon released; that thereafter, on the 19th day of May, 1908, the defendant filed its pleas and affidavit of defense, setting forth in detail its defense to plaintiff's demand, a copy of which pleas and affidavit are filed herewith and made a part of the affidavit of Charles W. Semmes.

On the 23 day of June, 1909, the defendant was adjudged a bankrupt, and thereafter on the 13 day of August, 1909 a trustee for the creditors of said defendant was duly elected; and said trustee employed Edwin L. Wilson as his attorney to represent him in all legal matters in reference to said bankrupt defendant, among which was this suit.

That thereafter counsel of record in this case for the plaintiff carried on negotiations with said Wilson looking to a settlement of the amount due from the bankrupt defendant to the plaintiff, and said negotiations finally terminated in an agreement that a consent verdict should be entered in the case for the sum agreed upon between counsel for plaintiff and said Wilson, to wit, the sum of Eighty Thousand, Seven Hundred and forty-eight Dollars and twenty-nine cents ($8,748.29) with interest from November 20th, 1907,
19 and said agreement was carried out, and this case which was numbered 642 on the trial calendar of this court, and which would not, in the ordinary course of the trial of cases at that time, have been reached for trial until the next ensuing October term, was called before Mr. Justice Clabaugh, holding Circuit Court No. 2, on the 19th day of May, 1910, and a consent verdict was immediately brought in against the defendant in the amount agreed upon between said counsel, to wit, the sum of $8,748.29, with interest from November 20, 1907, and thereafter on to wit, the 25th day of May, 1910, judgment upon said verdict was entered against the defendant and also against the United Surety Company for the sum of $8,748.29, with interest as aforesaid; that at the time said consent

verdict was taken, this affiant is informed by said Wilson and believes the fact to be, no evidence of any kind or character was taken to prove the demand of the plaintiff, save and except that Mr. M. J. Colbert, of counsel of record for the plaintiff testified that prior to the bringing of this suit he had heard Charles W. Semmes, who was then an officer of the defendant corporation, admit that the claim was just and due.

Affiant further states that the local agents of the United Surety Company in the District of Columbia are Oscar J. Ricketts and Edward B. Eynon, Jr., co-partners, trading in said agency business as Ricketts & Eynon, and that this fact, together with the fact that affiant was attorney for United Surety Company, was at the time of the negotiations between the plaintiff and said Wilson, well known to counsel for the plaintiff but notwithstanding this counsel for the plaintiff gave no notice or warning of any kind or character to the said United Surety Company or to the said Ricketts & Eynon, its local agents, or to your affiant, its attorney, or to any of the officers of the Semmes-Kelly Company that said negotiations were being carried on, or that a consent verdict was contemplated, and the first information the United Surety Company, or said Ricketts & Eynon, or any of the officers of the Semmes-Kelly Company, or your affiant had, that said consent verdict had been taken and said judgment entered was when your affiant noticed it on the docket of this court, when he was examining this case a short time after the entry of said judgment, and that since the discovery thereof this affiant has requested counsel for the plaintiff to have said judgment set aside, and the case tried upon its merits as this affiant believes the said Surety Company is entitled, under the law to have done, but said counsel have declined so to do, and have issued execution upon said judgment, and attached the credits of the United Surety Company in the hands of its local agents, said Ricketts & Eynon, and threatened to your affiant to issue other executions in an endeavor to satisfy the said judgment obtained against the United Surety Company, so as aforesaid.

Your affiant further states that there is a good defense to a large portion of said claim, to wit, the sum of Five Thousand, Seven Hundred and fifty-four Dollars and thirty cents ($5,754.30), and that if the said judgment is set aside and the case ordered to be tried upon its merits the said United Surety Company is prepared to defend said suit upon its merits, and to produce competent evidence to
20 prove that the said claim of the plaintiff should be reduced to the extent of the said sum of $5,754.30, as said defense is more in detail set out in the pleas and affidavits of defense filed in this case.

And your affiant further states that he is informed and believes that counsel for the plaintiff undertook to secure said consent verdict not for the purpose of settling this claim against the defendant but for the sole purpose of attempting to make the Surety Company pay said judgment.

R. GOLDEN DONALDSON.

Subscribed and sworn to before me this 3rd day of September, A. D., 1910.

[SEAL.] ANNA M. BOSSE,
Notary Public, D. C.

Affidavit of John J. Hamilton.

Filed September 7, 1910.

* * * * * * *

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, a Notary Public in and for the District aforesaid, John J. Hamilton, who being first duly sworn, deposes and says that he is a citizen of the United States and a resident of the District of Columbia, and is a member of the Bar, and of counsel for the plaintiff in the above-entitled cause.

That he was present at one interview between Mr. Charles A. Douglas, representing the defendant, and Mr. Colbert, representing the plaintiff in said suit, some months after said suit had been filed and had gone to issue.

Affiant's recollection is that either Mr. Semmes or Mr. Kelly, of the defendant corporation, was also present at said interview; that said interview was sought by Mr. Douglas for the purpose apparently of arriving at a settlement of the controversy between the plaintiff and the defendant, and he took up and discussed with affiant and Mr. Colbert the several grounds on which the defendant claimed a set off against the plaintiff's claim, and set forth in the pleas filed by defendant and its affidavit of defense. That the defendant claimed in its pleas and affidavit that it had a contract with the plaintiff to deliver a certain number of barrels of fortified juice at the rate of 9½ cents per gallon, less a rebate of one cent per gallon, or a net price of 8½ cents per gallon, and after the execution of said contract, and after various deliveries had been made to the defendant thereunder, the defendant ordered 1,405 barrels additional of said fortified juice, which it claimed the plaintiff declined to deliver, and it was compelled to go out into the market and purchase said juice at the price of 10½ cents per gallon, thereby resulting in a loss to the defendant of two cents per gallon on said 1,405 barrels, amounting to $1,184.98. That the second item of set-off claimed by the
21 defendant was the allegation that 135 barrels of fortified juice shipped by the plaintiff to the defendant had been seized by the Government for misbranding, under proceedings instituted in the Supreme Court of the District of Columbia, but was thereafter returned to the defendant upon its promise to reship said goods back to the plaintiff, and that the plaintiff should allow a credit for the value of said goods and the expense to which defendant was put in connection therewith, amounting to $663.18. The plaintiff objected to the allowance of this item on the ground that the barrels had been branded in the manner requested by the defendant, and that the sale had been completed when said shipment was placed on

the cars at Buffalo, New York, the home office of the plaintiff, consigned to the defendant at Washington, D. C., and that when said goods were reshipped by the defendant to the plaintiff the plaintiff declined to receive them, and they were placed on storage by the carrier and thereafter sold for storage charges. These two items of credit were insisted upon by Mr. Douglas, the only other item of credit claimed being the claim by the defendant that the product shipped by the plaintiff to it and sold by it in its business, had not, as the defendant believed, contained the number of pounds of sugar which the defendant was charged with by the plaintiff. The plaintiff insisted that the product did contain the amount of sugar called for by the bill, and offered to satisfy the defendant, or its agents, to that effect by the testimony of experts to be selected for that purpose, but who should have no connection whatever with the plaintiff Company. That the result of said interview was that Mr. Douglas stated if the two credits of $1,184.98 and $663.18, hereinbefore referred to, were allowed, the defendant would send one of its officers to Rochester to examine into the third item, and if convinced that the amount of sugar called for by the contract was used in the product which had been delivered to the defendant and sold by it to its customers that the balance of the bill sued for would be promptly paid.

Affiant further avers, on information and belief, that the defendant not only did not send its representative to Rochester, as agreed upon, but very shortly after said interview went into bankruptcy. That at said interview the plaintiff's attorneys agreed, in order to affect a compromise and immediate settlement of said suit, to allow the two items of $1,184.98 and $663.18, if the balance of the bill was promptly paid, and they obtained the impression from the attorney for the defendant that the suit would be settled on that basis, whether the defendant sent the representative to Rochester or not, but the defendant's going into bankruptcy a very short time thereafter, prevented said settlement from being consummated.

Affiant further avers that in the latter part of April, 1910, his firm was advised by the local attorneys of the plaintiff, at Rochester, New York, that several of the employés of the plaintiff Company, who had personal knowledge of the transactions between the plaintiff and the defendant, would soon be called west on business, and requested affiant's firm to make application to have said case advanced for trial; that application was made to Chief Justice Clabaugh,
22 in Circuit Court No. 2, in which Court said case was pending, for a day to be fixed for the trial of said case on the ground that there were non-resident witnesses who were about to leave for the west, and the Chief Justice promised to try said case about the first of May. That by reason of the pendency of the trial of other cases and the pendency on the call of certain other cases, the above-entitled cause was not reached until the 19th day of May, at which time Mr. Douglas, the attorney for the defendant, Mr. Wilson, attorney for the trustee in bankruptcy for the defendant, and the trustee himself were present in Court.

Affiant further avers that before said case was set for trial Mr. Colbert made arrangements with Mr. Douglas to be present in Court,

or to have Mr. Baker, of his firm, present in Court, on a day named, for the purpose of having a day certain fixed for the trial of said case.

Affiant further avers that a few days before said case was actually reached for trial he began the preparation of said case for trial on behalf of the plaintiff, and in connection therewith he saw Mr. Archer, the trustee in bankruptcy, and Mr. Wilson, his attorney on several occasions. He went over the case very thoroughly with the trustee in bankruptcy for the purpose of convincing him that the amount claimed by the plaintiff was justly due, with the result that Mr. Archer stated that he would have to oppose the trial of said case and ask the Court to stay further proceedings therein until the termination of the bankruptcy case, unless the plaintiff would concede the two items of $1,184.98 and $663.18, which had been agreed upon between counsel for plaintiff and the defendant shortly before the bankruptcy of said defendant. In order to obtain a speedy trial of said case, and to avoid the expense and inconvenience of bringing certain witnesses from Rochester to Washington, affiant finally agreed with said trustee in bankruptcy that the plaintiff would allow a credit of the two items referred to, and would only insist upon a trial and verdict for the balance claimed to be due, as shown by the declaration. Not only was the verdict entered not a consent verdict, but this affiant and the trustee in bankruptcy declined to agree to have a consent verdict entered, the trustee taking the position that as the representative of the creditors of the bankrupt estate it was his duty to compel the plaintiff to prove its case, and this affiant taking the position that he did not desire a consent verdict because there was a forthcoming bond in the case, and any judgment entered against the defendant would have to be entered against the surety on the bond, and possibly objection might be raised by that surety to a consent verdict. It was, therefore, agreed by the trustee in bankruptcy and this affiant, that the plaintiff should prove its case for the amount due, less the credits agreed upon, which proof was accordingly produced and taken in open court after the jury had been sworn and the case was submitted to the jury by Chief Justice Clabaugh, after the conclusion of the taking of testimony and the announcement on the part of the defendant and the trustee in bankruptcy that they had no proof to offer. The jury therefore rendered
a verdict in favor of the plaintiff for the amount claimed in
23 the declaration, less the two items of credit agreed upon by the plaintiff's attorneys. Affiant is advised and believes, and his belief is based upon his investigation of the various papers and statements of witnesses in the possession of counsel for the plaintiff at the time when he began actively to prepare said case for trial, that the plaintiff is justly entitled to the full amount of said judgment against the defendant.

Affiant further avers that he did not notify Ricketts and Eynon the agents for the Surety Company, surety on the bond of the defendant, given to insure the return of said property in the event of judgment against the defendant *of* the time of the trial of said cause, because said Surety Company was not a party to the suit and not

entitled to be represented by counsel in said suit, and as affiant is advised and believes was not entitled to notice.

Affiant further avers that the bond filed by the defendant in this case shows that it, and its surety, the United Surety Company, undertook and did submit themselves to the jurisdiction of the Court, and agreed that whatever judgment was entered against the defendant should also be entered against said Surety Company.

Affiant further avers that final judgment in this case was entered in favor of the plaintiff on the 25th day of May, 1910, and within a few days thereafter affiant, having informed himself who the agents of the Surety were, he personally wrote Ricketts and Eynon, calling their attention to the fact that judgment had been entered in said case, and requesting that the same be promptly settled. That since the latter part of May, 1910, up to the present time, he has repeatedly called upon said agents, and the attorney for said Surety Company, for a settlement of said judgment, and that for at least six weeks thereafter the only excuse advanced by the attorney for said Surety Company for not paying said judgment was that he was endeavoring to force Charles W. Semmes, who was a member of the defendant corporation, to pay said judgment, by threatening to have him criminally prosecuted by reason of certain false statements claimed to have been made by said Semmes to said Surety Company at the time it executed said bond.

Affiant refers to the docket entries and papers and proceedings had in this cause, and prays that they may be read and considered a part hereof.

JOHN J. HAMILTON.

Subscribed and sworn to before me this 7th day of September, A. D., 1910.

[SEAL.] LOUISE F. DYER,
Notary Public, D. C.

Affidavit of M. J. Colbert.

Filed September 7, 1910.

* * * * * * *

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, a Notary Public in and for the District aforesaid, Michael J. Colbert, who being first duly
24 sworn, deposes and says that he is a citizen of the United States and a resident of the District of Columbia, and is one of the attorneys for the plaintiff in the above-entitled cause, wherein suit was brought in the month of April, 1908.

In said suit the plaintiff claimed to recover from the defendant the sum of $10,596.45, and the defendant admitted its liability for about one-half of said amount, and claimed certain credits which were the subject of long continued negotiations between the parties after suit was filed.

The defendant in said case was represented by the firm of Douglas, Baker and Sherrill, at whose office this affiant met Mr. Charles W. Semmes, one of the officers of the defendant corporation. At this interview there was also present Mr. James P. B. Duffy, one of the attorneys for the plaintiff, and after much discussion it was agreed by said Semmes, and by his attorney, Mr. Charles A. Douglas, that there was due to the plaintiff the full amount claimed in its declaration, less a credit of some eighteen or nineteen hundred dollars, and said Semmes thereupon agreed that he would go to the City of Rochester, in the State of New York, in company with Mr Gibbs L. Baker, for the purpose of verifying the statement that had been made to him that the plaintiff had put into the product sold by it to the defendant the requisite amount of sugar called for by its contract and bill against the defendant. The only other items of dispute between the parties, as set out in the pleas, were agreed to by the plaintiff and conceded to the defendant. Instead of going to the City of Rochester, as agreed upon, very much to affiant's surprise within a few days the Semmes-Kelly Company went into bankruptcy.

The case has been pending on the calendar of the Supreme Court of the District of Columbia for almost two years, and had been almost reached for trial on two occasions. Early in the spring of 1910 the condition of the case was called to the attention of Mr. Chief Justice Clabaugh, and he was advised that several of the plaintiff's non-resident witnesses were about to leave the east for the purpose of going to the west on business, and Douglas, Baker and Sherrill, attorneys for the bankrupt corporation, and Edwin L. Wilson, attorney for the trustee in bankruptcy of said corporation, were advised that the Court would be asked to set the case for trial, and made no objection thereto. A day was accordingly fixed for trial in the early part of May, 1910, and there were present at the trial this affiant, Mr. John J. Hamilton, representing the plaintiff, Mr. Charles A. Douglas, representing the defendant in the case, and Mr. E. L. Wilson, representing the trustee in bankruptcy, and the trustee in bankruptcy himself. The case was regularly called for trial, the jury was empaneled, and sworn testimony was taken in the presence of Mr. Chief Justice Clabaugh and the jury. The case was submitted to the jury, who returned a verdict, which appears of record in this case, upon which the judgment was subsequently entered. This affiant denies that the verdict was a consent verdict, and the Court submitted the whole case to the jury on the testimony
25 given by this affiant, and no testimony whatever was introduced on the part of the defendant corporation, or by the trustee in bankruptcy, although both the defendant and the trustee in bankruptcy were represented at the trial.

This affiant denies that the judgment rendered in this cause should be reduced by the sum of $5,334.30, or by any other sum whatever; on the contrary this affiant says on oath that Charles W. Semmes, one of the officers of the defendant corporation, admitted that the entire amount of the judgment entered was actually due, if the plaintiff could demonstrate to his satisfaction that the requisite pounds of

sugar to the barrel was used in the product sold by the plaintiff to the defendant, which the plaintiff stood at all times ready and willing to do, and which was not done owing to the failure of the said Semmes to keep his engagement in going to Rochester, and by subsequently permitting his corporation to go into bankruptcy.

This affiant denies that Charles W. Semmes, who has made an affidavit in this case, had no notice of the fact that this case was about to be tried, for the reason that his attorneys were notified and were actually present in Court.

This affiant denies that the verdict was a consent verdict; on the contrary he, and his associate, Mr. John J. Hamilton, refused to take a consent verdict for the reason that a consent verdict might possibly affect their right to proceed against the surety in this case, and for that reason affiant, who was a witness at the trial, insisted that the case should proceed to proof. At the conclusion of the plaintiff's proof the defendant made no effort whatever to disprove the statements made by affiant on the stand, and put no witness upon the stand to justify the defense made by the defendant in this case, and the verdict was taken for the amount claimed by the plaintiff, after conceding to the defendant the only two items which had been a matter of dispute between the parties, and which the plaintiff agreed to rebate to the defendant.

Speaking for himself, this affiant says that he did not know at the time of the trial who was the representative of the Surety Company. Affiant made no effort to find out who was the representative of the Surety Company for the reason that they were not parties to the record, and had no standing in Court, having entered into a bond, submitting to the jurisdiction of the Court, and agreeing to abide by and pay whatever judgment might be rendered against the defendant corporation.

This affiant denies that he ever agreed with E. L. Wilson to take a consent verdict in this case; on the contrary he expressly refused to have a consent verdict entered for the reasons hereinbefore stated.

Affiant denies, from his personal knowledge of this case, that the defendant has absolutely any defense whatever, legal or equitable, to the judgment heretofore entered in this cause.

And further affiant saith not.

M. J. COLBERT.

Subscribed and sworn to before me this 7th day of September, A. D., 1910.

[SEAL.] LOUISE F. DYER,
Notary Public, D. C.

26 *Order Staying Execution, &c.*

Filed September 7, 1910.

* * * * * * *

Upon consideration of the motion of United Surety Company it is this 7th day of September 1910 ordered that garnishment and exe-

cution on the judgment entered in this case be and it is hereby stayed until the further order of the Court; it is further ordered that consideration of the motion of said United Surety Company to vacate the said judgment be set down for hearing on October 4th, 1910.

JOB BARNARD, *Justice.*

Opinion of Court.

Filed October 21, 1910.

* * * * * * *

The declaration in this case, filed April 22, 1908, is composed of the common counts, with a bill of particulars, claiming $10,596.45, on a number of bills for goods sold, with interest on the several bills from thirty days after their date respectively, the first being dated November 9, 1907, and the last March 3, 1908.

The defendant filed a number of pleas, with an affidavit of defense, in which a defense as to $663.18 is claimed under the plea of not indebted, and $5,754.30 by way of set-off, making a total amount claimed by the pleas of $6,417.48, which, if sustained on a trial, would have reduced plaintiff's claim to $4,178.97.

A writ of attachment was issued when the declaration was filed, and a levy made on a large stock of merchandise, groceries, canned goods, etc., located at store premises #614-616 Pennsylvania Avenue.

On April 23, 1908, the defendant executed an undertaking in the form prescribed by Section 454 of the Code, with the United Surety Company of Baltimore as surety; whereupon the Marshal returned the writ of attachment as follows:

"Attached as per schedule herewith, and served defendant with a copy of this writ and notice prescribed by Section 446 of the Code, April 22, 1908."

On the writ, following the signature of the Marshal to this return, is endorsed, "Released on bond April 23, 1908."

Issue was joined on the pleas, and the case ordered on the calendar June 12, 1908.

Thereafter, and while the suit was pending, the defendant corporation was adjudged a bankrupt.

On May 19, 1910, a jury was sworn, and a verdict rendered for plaintiff for $8,748.29, with interest from November 9, 1907; and on May 25, 1910, a judgment was entered against the defendant corporation, and the United Surety Company of Baltimore, its surety, for $20,000, to be released on the payment of the amount of said verdict.

27 On September 7, 1910, the said Surety Company filed a motion herein to stay execution, and to vacate the said judgment, claimng that the said verdict was taken without notice to it, and without opportunity for it to defend, and without any trial on the merits, but was in fact by consent of the attorney for the plaintiff, and the attorney for the trustee in bankruptcy of the defendant cor-

tion, the Semmes-Kelly Company, although it was not in form consent verdict.

his motion is supported by affidavits of the president of the mes-Kelly Company, and of the agent of the United Surety pany, and of the attorney for said Company, the said affidavits ng the items of set-off in the pleas, aggregating $5,754.30, as amount which should have been deducted from the plaintiff's n, and claiming that said amount is justly due from the plaintiff e Semmes-Kelly Company, or its representative.

ese affidavits do not reiterate or claim the additional sum as a se which was claimed in the affidavit annexed to the pleas, t—$663.18; but if the amount which is now claimed in these vits had been deducted, plaintiff's judgment should have been nly $4,842.15.

unter-affidavits were filed by two of the attorneys for the plain- nd the case has been argued, and submitted to the court upon notion of the said Surety Company to vacate the judgment.

examination of the record, it will be found questionable her a proper verdict could have been rendered for the amount l, with interest from the date stated, under the pleading, unless nsent; and judgment could not have been properly rendered st the defendant and the Surety Company, for $20,000, the ed appraised value of the property attached, because the record s that no appraisement was made.

e fact that a verdict was rendered for the amount stated, with est from November 9, 1907, indicates that there must have been understanding or consent that a verdict should have been . Otherwise, the clerk would not have entered the verdict and ment in that form, under the claim made in the declaration, he absence of any appraisement.

notice was given to the Surety Company; and if the verdict he result of an understanding between the trustees in bank- y and the plaintiff, and no trial was had on the issues made by leas, the attorney for the Surety Company contends that it l not be liable under the language of the undertaking.

tion 454 prescribes the form of the undertaking, and it re- s the defendant and the surety to appear and submit to the liction of the court, and to "abide by and perform the judgment e court in the premises in relation to said property."

judgment of the court seems to have been entered in relation e said property, and the only meaning that seems reasonable to n to these words is, that the judgment must be in such form as ow that the plaintiff was entitled to maintain his writ of attach- ment and that the property attached would be subject to a judgment of condemnation and sale. Otherwise, these words would seem to be useless in the undertaking.

the surety had become bound to abide by and perform any per- judgment which might be rendered in the case, it would have lation to the property attached, and might be far in excess of ability which it undertook to assume, to wit,—to be responsible e value of the property attached and returned to the defendant.

Surely the surety would not undertake to be responsible for anything more than that, and there should be, it seems to me, some judgment of the court as to the plaintiff's right to maintain his attachment, and to have condemnation of that property, in order to hold the surety.

Section 455 of the Code provides for a joint judgment against the defendant and his surety, for the appraised value of the property, if judgment in the action shall be rendered in favor of the plaintiff. That further indicates that the correct meaning to be given to these sections is, that the surety on the undertaking for the defendant to obtain a release of the goods attached, is to be held responsible only for the value of the goods released.

Section 454 prescribes another form for an undertaking to be executed by a third party, in whose hands goods may be attached, in order that said third party may have the return of the goods pending the attachment proceeding; and that form expressly says that the surety is to abide by the judgment of the court in relation to said property, and that if the same shall be condemned to satisfy the claim of the plaintiff, judgment may be rendered against said surety for the value of said property, and costs, unless said property shall be forthcoming to satisfy the judgment of condemnation.

Sections 464 and 466 seem to prescribe the form of judgment in attachment cases. In case the attached property has been retained by, or delivered to, a garnishee, Section 468 prescribes the form of judgment, and provides that judgment of condemnation of such property shall be rendered, as provided in Section 466, and also a judgment entered that the plaintiff recover from the garnishee, and his surety, the value of said property, not exceeding the plaintiff's claim.

The section then provides for satisfaction of the judgment if the property be forthcoming, undiminished in value, within ten days; otherwise, that execution may issue; and if the property is so delivered, then that the Marshal shall sell the same to satisfy the judgment of condemnation.

The first half of this section seems to prescribe a correct form of judgment to be entered, where an undertaking has been given by the defendant, as was done in this case; and the entry of judgment against a surety, without a judgment of condemnation, would appear to be irregular, if not void.

I am disposed to hold that the judgment in this case against the surety should be set aside, and a trial had on the merits, and the said defendant's motion will therefore be granted, unless the plaintiff shall, within ten days from the date this opinion is filed, enter a remittitur as to all its said judgment and interest in excess of $4,842.15, with interest thereon from February 1, 1908, and costs.

JOB BARNARD, *Justice.*

29 Supreme Court of the District of Columbia.

FRIDAY, October 21st, 1910.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice, presiding.

* * * * * * *

Upon consideration of the motion of the United Surety Company filed herein September 7th, 1910, by its attorney R. Golden Donaldson, it is ordered that the verdict rendered herein May 19th, 1910, and the judgment thereon, entered May 25th, 1910, be and they are hereby, set aside, vacated and for nothing held as against said United Surety Company, unless the plaintiff shall within ten days hereof file herein "a remittitur to all of its said judgment and interest in excess of $4,842.15 with interest thereon from February 1, 1908, and costs"—whereupon, the plaintiff by its attorneys of record, in open court, declining to file such remittitur, said verdict and judgment are hereby set aside, vacated and for nothing held as to said United Surety Company.

Further upon motion of plaintiff by its attorneys of record, it is ordered that this cause be and the same is hereby ordered on the present trial calendar at the foot thereof.

Objections to Impaneling and Swearing Jury.

Filed May 6, 1912.

United Surety Company objects to impaneling and swearing of the jury on the following grounds:

1. The issue joined on the pleadings between the plaintiff and the defendant has already been determined by a jury heretofore impaneled and judgment, rendered on such verdict in favor of the plaintiff which judgment remains of record unreversed and having full force and effect. There is no authority in law, therefore, for the impaneling of another jury and swearing them to retry the same issue.

2. There is no authority in law, and no jurisdiction in the court, to impanel and swear a jury in this case to try an issue joined between the plaintiff and the United Surety Company, because the record of the cause does not show that any issue has ever been joined or made between the plaintiff and said United Surety Company.

3. If the record in this case shows that the property of the defendant sought to be seized under the writ of attachment issued herein, was appraised by the Marshal, (which is denied) the only judgment that could have been legally entered against the United Surety Company, surety on the undertaking given, was for such appraised value. If the record does not show that said property was so appraised, there is no authority in law for such appraisal now to be made, or a valuation of said property now to be made, by a jury to be sworn in the cause.

30 4. There is now of record in this cause an existing judgment against the defendant and there is no statutory or other authority and no jurisdiction in the court, to enter judgment herein, so far as the United Surety Company is concerned, whatever may be the rights of the plaintiff upon the undertaking signed by said United Surety Company, as a common law undertaking.

5. The plaintiff having elected to take a personal judgment against the defendant for the amount of its claim, and having elected to have that judgment remain of record after the expiration of the term at which it was rendered and after it was vacated as to the United Surety Company, has abandoned and waived its right to a judgment against the United Surety Company upon the undertaking given by it, whereby it undertook to pay any judgment which might be rendered in relation to the attached property.

6. Sec-. 454 and 455 of the Code of Law for the District of Columbia are unconstitutional and void in so far as they permit the entry of a judgment against the surety on an undertaking given thereunder, without permitting him his day in court and deprive him of due process of law to which he is entitled under the Constitution of the United States.

7. Under a proper construction and application of that provision of the Constitution of the United States declaring that no person shall be deprived of his property without due process of law, Sec-. 454 and 455 of the Code of Law for the District of Columbia, in so far as they permit a summary judgment to be entered against a surety or a release undertaking in attachment, who has submitted himself to the jurisdiction of the court and promised to pay any judgment of the court in the premises in relation to the property attached, without provision for an inquiry as to value of the property released, at which such surety shall have an opportunity to appear and be heard—are unconstitutional and void.

8. This court has no power or jurisdiction to proceed further in this cause so far as the United Surety Company is concerned, having exhausted such power and jurisdiction by the entry of the judgment heretofore rendered and the vacation of such judgment as to said Company.

C. C. TUCKER,
Att'y for United Surety Co.

Supreme Court of the District of Columbia.

MONDAY, May 6, 1912.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

Now comes here the plaintiff by its Attorney Messrs. Hamilton, Yerkes and Hamilton; whereupon, this cause being called for trial, Mr. Charles C. Tucker, Attorney for The United Surety Company of Baltimore, Md., objects to the impaneling and swearing of a jury

in this cause for the reasons set forth and filed herein, which
31 objection is by the Court overruled and exception noted; thereupon, it is by the Court ruled and held that the order of October 21, 1910, setting aside the verdict of May 19, 1910, and judgment of May 25, 1910, as to said United Surety Company of Baltimore, Md., operates in law to set aside the verdict and judgment as to principal as well, and that the trial shall proceed de novo; whereupon, comes a jury of good and lawful men of this District, to wit:

Henry E. Sullivan	Edwin M. Tansill
John G. Hodges	George F. Pulaski
John Creaven	Charles A. Hall
Samuel G. Eberly	William H. Thomas
Ernest J. Smith	John W. Todd
Edwin P. Goodwin	Jesse W. Callender

who, being duly sworn to well and truly try the issue herein joined, after a partial hearing of the evidence, are respited until the meeting of the Court to-morrow.

WEDNESDAY, May 8, 1912.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

Come again the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday who, after the case is given them in charge on their oath say they find the issue herein joined in favor of the plaintiff, and assess its damages by reason of the premises at Nine thousand, nine hundred and thirty-seven and 20/100 dollars ($9,937.20).

Motion for Arrest of Judgment.

Filed May 11, 1912.

* * * * * * *

Comes now the United Surety Company, by its attorneys, and moves the court to arrest the entry of judgment on the verdict in the above entitled cause upon the grounds following, to wit:

1. That, as the record shows there was no appraisement of the value of the defendant's property at or after the issue of the writ of attachment herein, the court has no jurisdiction to enter a judgment against the surety on the undertaking given by the United Surety Company.

2. That even if it were permissible for the jury to find by this verdict the value of the property of the defendant before or after the issue of the writ of attachment herein, in order that the liability of the United Surety Company upon the undertaking given by it might be thereby fixed (which is denied) as said value was not fixed by the verdict found by the jury, the court is therefore without

jurisdiction to enter a judgment on said verdict against said company.

32 3. That as the liability of the said United Surety Company upon the undertaking given by it is limited by the terms thereof, to abiding by and performing any judgment which may be rendered in relation to the attached property, and as the verdict of the jury merely found the amount due from the defendant to the plaintiff, without any finding in relation to said property, the court has no jurisdiction to enter any judgment on said verdict against said United Surety Company.

4. That sections 454 to 456, both inclusive, of the Code of Laws for the District of Columbia are unconstitutional and void under that provision of the Constitution of the United States, which declares that no person shall be deprived of his property, without due process of law, in so far as they attempt to permit or do permit a judgment against the surety upon an undertaking given in said section 454 to abide by and perform any judgment in relation to attached property upon the release of the same from the right of attachment without the submission to a jury of any question of fact relating to said property; or if said sections are to be construed as permitting a judgment to be rendered against such a surety for the appraised value of such property, and are valid and constitutional to that extent then, upon a proper construction and application of said provision of the Constitution to this case, the rendition of a judgment herein for the value of said property, without the submission of the question of its value to a jury, would be a violation of said provision of the Constitution in that the record shows that there was no appraisement of the said value.

R. GOLDEN DONALDSON,
CHAS. C. TUCKER,
Attorneys for said United Surety Company.

Messrs. John W. Yerkes & John J. Hamilton, Attornevs for said Plaintiff:

The aforegoing motion will be called for hearing on Friday, May 17th, 1912.

R. GOLDEN DONALDSON,
CHAS. C. TUCKER,
Attorneys for said United Surety Company.

Service of copies of the above motion and notice admitted this — day of May, 1912.

——— ———,
Attorneys for said Plaintiff.

Motion for Judgment.

Filed May 21, 1912.

* * * * * * *

Now comes the plaintiff, and moves the court to enter judgment for plaintiff on the verdict rendered on May 8th, 1912, in the above-entitled cause, and that said judgment be entered jointly
33 against the defendant, Semmes-Kelly Company, and the United Surety Company, surety on the bond executed herein by defendant to secure the release of the property attached in this cause, and that said judgment be entered for the sum of $9,937.20, with costs, and interest thereon from the date of the rendition of said judgment, but the said judgment to be released as to said United Surety Company upon the delivery up by it, or by the defendant, of the property levied upon to the United States Marshal of this District within ten days from the date of the entry of said judgment; otherwise said judgment to be and remain in full force and effect.

HAMILTON, YERKES & HAMILTON,
Att'ys for Pl'ff.

Supreme Court of the District of Columbia.

TUESDAY, June 25, 1912.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

On consideration of the motion in arrest of judgment, made and filed herein by the United Surety Company, heretofore argued and submitted to the Court, it is this 25th day of June, 1912, ordered and adjudged by the Court that said motion be, and the same is, overruled.

On consideration of the motion of the plaintiff for judgment on the verdict of the jury rendered herein at a former day of this term of Court, it appears to the Court that the writ of attachment which plaintiff caused to be issued in this cause on April 22, 1908, was levied by the Marshal of this District on the same day upon the stock of merchandise, groceries, canned goods, &c. owned and held by the defendant, Semmes-Kelly Company, and located upon premises 614, 616 Pennsylvania Avenue, Northwest, this District, and that the Marshal returned said writ on the said 22d day of April, 1908, endorsed: "Attached as per schedule herewith, and served defendant with a copy of this writ and notice prescribed by Section 446 of the Code, April 22, 1908."

That the schedule referred to in said return was attached to said writ and read as follows: "Schedule of levy under writ of attachment: Large stock of merchandise, groceries, canned goods, &c.,

located at store premises No. 614, 616 Penn. Ave., N. W. valued at $20,000."

And it further appears to the Court that on the 23d day of April, 1908, the defendant having notified the Marshal that it intended to have said attachment released, thereupon executed the forthcoming bond or undertaking in evidence, with the United Surety Company as surety thereon, as authorized by statute; and thereupon said stock of merchandise, &c., was released from said attachment by the Marshal, no appraisers having been appointed.

34 It further appears to the Court from the uncontradicted testimony of Charles W. Semmes, President of the defendant company, who signed the application to said Surety Company for said bond, and who executed and delivered to said Surety Company an indemnifying bond in this matter, that the stock of goods levied upon and attached by the Marshal was worth more than $20,000 at the time of the levy, and this Court having offered to permit said Surety Company to introduce other evidence as to the value of the stock of goods so levied upon by the Marshal if it so desired, or, if so advised, to submit the question of the value of the goods levied upon to a jury to be summoned and selected for that purpose, and said Surety Company having declined to take advantage of either of said offers, the Court is of the opinion and so finds that under the evidence submitted, including the record in this case, the plaintiff has established its right to a joint judgment in this action against the defendant and the United Surety Company, and therefore, it is now ordered and adjudged that the plaintiff, American Fruit Product Company, a corporation, recover of the defendant, Semmes-Kelly Company, a corporation, and the United Surety Company, a corporation, the sum of $9,937.20 found due by the said defendant to said plaintiff by the verdict of a jury duly rendered herein, and the costs of this suit, and interest on said amount of $9,937.20 from this day until paid, at the rate of six per cent per annum, and for which execution shall be had, and may be issued, but this judgment to be released and held for naught as to said United Surety Company upon the delivery by it or by the defendant to the United States Marshal of this District of the property levied upon, if said delivery be made within ten days from the date of the entry of this judgment; otherwise said judgment to be and remain in full force and effect.

WENDELL P. STAFFORD, *Justice.*

To the foregoing the United Surety Company by its Attorney of record in open Court notes an exception, and also an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100.)

Further, it is ordered that the time within which to submit the bill of exceptions, and file the transcript of record in this cause, in the Court of Appeals of the District of Columbia be, and it is hereby extended to and including September 14, 1912.

Memoranda.

July 17, 1912.—$100 deposited by the United Surety Company in lieu of bond on appeal.

September 13, 1912.—Time to submit Exceptions extended to October 15, 1912.

35 Supreme Court of the District of Columbia.

TUESDAY, October 15, 1912.

Session resumed pursuant to adjournment, Mr. Chief Justice Clabaugh presiding.

* * * * * * *

Before Justice Stafford.

Now comes here The United Surety Company of Baltimore by its Attorneys of record, and prays the Court to sign, seal, and make part of the record, its bill of exceptions taken during the trial of this cause, now for then, which is accordingly done.

Upon motion of The United Surety Company of Baltimore by its Attorneys of record, it is ordered that the time within which to file the transcript of record in this cause, in the Court of Appeals of the District of Columbia, be, and it is hereby further extended to and including November 15, 1912.

Bill of Exceptions.

Filed October 15, 1912.

* * * * * * *

Be it remembered that this cause came on for hearing and trial before Mr. Associate Justice Stafford and a jury. There were present on behalf of the plaintiff Mr. John W. Yerkes and Mr. John J. Hamilton, and on behalf of the United Surety Company Mr. Charles Cowles Tucker and Mr. Abner H. Ferguson. There was no appearance for the defendant the Semmes-Kelly Company.

Before the Jury was sworn, Mr. Tucker on behalf of the United Surety Company objected to a jury being sworn in the case upon the following grounds:

1. The issue joined on the pleadings between the plaintiff and the defendant has already been determined by a jury heretofore impaneled and judgment, rendered on such verdict in favor of the plaintiff, which judgment remains of record unreversed and having full force and effect. There is no authority in law, therefore, for the impaneling of another jury and swearing them to retry the same issue.

2. There is no authority in law, and no jurisdiction in the court, to impanel and swear a jury in this case to try an issue joined be-

tween the plaintiff and the United Surety Company, because the record of the cause does not show that any issue has ever been joined or made between the plaintiff and said United Surety Company.

3. If the record in this cause shows that the property of the defendant sought to be seized under the writ of attachment issued herein, was appraised by the Marshal (which is denied), the only judgment that could have been legally entered against the
36 United Surety Company, surety on the undertaking given, was for such appraised value. If the record does not show that said property was so appraised there is no authority in law for such appraisal now to be made, or a valuation of said property now to be made, by a jury to be sworn in the cause.

4. There is now of record in this cause an existing judgment against the defendant and there is no statutory or other authority and no jurisdiction in the court, to enter judgment herein, so far as the United Surety Company is concerned, whatever may be the rights of the plaintiff upon the undertaking signed by said United Surety Company, as a common law undertaking.

5. The plaintiff having elected to take a personal judgment against the defendant for the amount of its claim, and having elected to have that judgment remain of record after the expiration of the term at which it was rendered and after it was vacated as to the United Surety Company, has abandoned and waived its right to a judgment against the United Surety Company upon the undertaking given by it, whereby it undertook to pay any judgment which might be rendered in relation to the attached property.

6. Sec-. 454 and 455 of the Code of Law for the District of Columbia are unconstitutional and void in so far as they permit the entry of a judgment against the surety on an undertaking given thereunder, without permitting him his day in Court and deprive him of due process of law to which he is entitled under the Constitution of the United States.

7. Under a proper construction and application of that provision of the Constitution of the United States declaring that no person shall be deprived of his property without due process of law, Sec-. 454 and 455 of the Code of Law for the District of Columbia, in so far as they permit a summary judgment to be entered against a surety or a release undertaking in attachment, who has submitted himself to the jurisdiction of the court and promised to pay any judgment of the court in the premises in relation to the property attached, without provision for an inquiry as to the value of the property released, at which such surety shall have an opportunity to appear and be heard, are unconstitutional and void.

8. This court has no power or jurisdiction to proceed further in this cause so far as the United Surety Company is concerned, having exhausted such power and jurisdiction by the entry of a judgment heretofore rendered and the vacation of such judgment as to said company.

Thereupon the court overruled said objection, to which ruling of the court the attorneys for the United Surety Company then and there duly excepted.

Thereupon on motion of the plaintiff the court wrote out and handed to the reporter the following ruling, to which the attorney for the United Surety Company then and there objected upon the ground that no notice to appear for hearing had been given to the United Surety Company; that the court was without authority or jurisdiction to enter such order or ruling summarily without
37 such notice to appear and be heard; and that the court was without power or jurisdiction to modify or alter, in any way, an existing judgment of the court which had been enrolled, the term having expired at which such judgment was rendered: "It is ruled and held that the order setting aside the verdict and judgment as to the surety operates in law to set aside the verdict and judgment as to the principal as well, and that the trial shall proceed de novo."

Thereupon the court overruled said objection and the attorney for the said United Surety Company duly reserved an exception.

Thereupon a jury was impaneled and sworn to try the issue joined between the plaintiff and the defendant in the cause.

Thereupon the plaintiff to maintain the issue on its part joined called as a witness GILBERT N. TREBLE, who being first duly sworn testified on direct examination as follows: That he was the superintendent of the manufacture of cider vinegar for the plaintiff and was employed by it at its factory at Spencerport, New York, in November and December, 1907 and January, February, and March, 1908, as manager. He was then asked whether he had anything to do with the filling of any orders for the defendant, to which question the attorney for the United Surety Company objected on the ground that testimony was not admissible or competent to prove the claim of the plaintiff against the defendant, that claim having already been reduced to judgment, and on the further ground that as there being appearance in the action on behalf of the defendant, it would be improper and incompetent to make any sort of inquiry into the state of the claim.

Thereupon the Court overruled the objection, to which ruling of the court the attorneys for the United Surety Company duly reserved an exception.

Thereupon the court ordered that without the United Surety Company repeating such objection to all of the testimony offered in behalf of the plaintiff in support of its claim against the defendant, such objections should be deemed and taken to have been made at the time of the offering of such testimony, and that it should be deemed and taken to be that the court overruled each and every of such objections and that exceptions to such rulings were duly reserved.

Thereupon the plaintiff, further to maintain the issue on its part joined, gave evidence tending to show that it had sold and delivered to the defendant the goods described in the declaration and that there was due it from the defendant the sum of $9,937.20, and that the defendant was a corporation incorporated under the laws of the State of Virginia.

Thereupon, FREDERICK CUSICK was called as a witness on behalf of the plaintiff and after being duly sworn testified that he was and had been for twenty years a deputy United States Marshal. In answer to the question whether on April 22, 1908, he had oc-
38 casion to execute an attachment in the case of the American Fruit Product Company against the Semmes-Kelly Company, the witness replied "yes, sir." The witness was then asked "What did you do?" to which question the attorney for the United Surety Company objected on the ground that the statute does not provide for inquiry by the jury into the circumstances of the issue of a writ of attachment, that is, in the trial of the action between the plaintiff and the defendant, and that therefore all evidence that related to what was done in levying the attachment, or following the levying of the attachment, was inadmissible and incompetent, as tending to impeach or contradict the record in the case; and further that there is no statutory provision for any trial of any issue by the jury that is sworn to try the issue joined between the plaintiff and the defendant, and no issue has been made up between the plaintiff and the United Surety Company, and no provision is made by law for such an issue to be made up.

Whereupon the court overruled the objection, to which ruling of the court the attorney for the United Surety Company duly reserved an exception.

Thereupon the Court stated that he was not sure that this evidence was for the consideration of the jury at all.

Mr. YERKES: "It is for the court."

The witness further testified on direct examination that he went to the place of business of the defendant at 616 Pennsylvania Avenue, and met there Mr. Semmes; and served the writ on him; that Mr. Semmes told the witness that he was expecting it and said they were going to give a bond, so the witness telephoned to the office and got the appraisers to come down there. The witness then proceeded to state "I telephoned the office"—whereupon counsel for the United Surety Company then and there objected to the testimony on the ground that what the witness was testifying to having transpired in the absence of the Surety Company or any representative of it, the testimony was not binding in any way upon the United Surety Company.

Whereupon the court overruled the objection, to which ruling of the court the United Surety Company then and there duly excepted.

The witness continuing, stated that he called up Mr. Robison, the chief deputy; that he asked witness how long it would take to make an appraisement and witness told him it would take at least two or three days; that there was quite a large stock of goods there; that he, Mr. Robison, called up the witness a few minutes afterwards and told him not to have the appraisement made but he told witness to see Mr. Semmes and ask him if he had twenty thousand dollars' worth of stock in there; that witness did so and Mr. Semmes said "Yes, I have a great deal more"; that Mr. Semmes also took witness through the store from top to bottom, that he showed witness on the first floor a large amount of goods and cases — canned

goods, and so on, that there was a large amount up stairs and all over the store; that Mr. Semmes said he had a great deal larger amount than twenty thousand dollars' worth; that witness
39 heard Mr. Semmes talking over the phone with reference to the same thing while he, witness, was there. The witness was then asked "Who was it?", whereupon the attorneys for the United Surety Company moved the Court to strike out all the testimony of the witness as to what Mr. Semmes told him in relation to the value of his stock as being in no wise binding upon the United Surety Company.

Whereupon the court overruled the objection, to which ruling of the court the United Surety Company duly noted an exception.

The witness further testified that Mr. Semmes was talking over the telephone to Mr. Douglass, that he told Mr. Douglas that he, Mr. Semmes, had much more than twenty thousand dollars' worth, the same as he had told witness. The witness further testified that he had the appraisers right there but was subsequently telephoned by Mr. Robison not to make the appraisement. Asked how long he remained in possession of the store witness replied "pretty much all the afternoon. I left there late in the evening I know. I stayed there until I was called off by Mr. Robison."

There was no cross-examination.

W. B. ROBISON having been called as a witness on behalf of the plaintiff and having been duly sworn, testified that he was the chief deputy Marshal in 1907 and 1908; that he was in his office at the time this attachment suit was filed by the plaintiff against the defendant; that he had a recollection that he was called up on the telephone by Mr. Douglas, or some one in his office, suggesting that such a writ was possibly coming and if it did come there would be no occasion to levy the attachment in the sense of disturbing the goods, as a forthcoming bond would be given to release the goods, or words to that effect; that witness had such suggestion before the writ was issued as he recollected; that then the writ came along, witness thinks rather late in the evening: that it was placed in the hands of Mr. Cusick to serve and execute: that he went down there and the appraisers were summoned; that the witness could not recollect just how it was that it was drawn to his attention that there was a large stock of goods there; that they were not appraised but on the schedule he wrote in "twenty thousand dollars" from the information that was given him, information either from Mr. Douglas, through the attorney in the case, or from Mr. Semmes' statements; that the witness knows it because he, the witness never saw the goods himself; that the witness was not on hand but that the writing in the schedule is his handwriting; that witness was present when the forthcoming bond was given, and thinks that there was also present Mr. Colbert; that witness was not sure whether Mr. Colbert was there, but Mr. Ricketts was present and witness thinks Mr. Donaldson was present; that Mr. Donaldson was attorney for the Bonding Company; that witness is sure that if Mr. Colbert was not present (but he thinks he

was present) he approved the bond; that witness thinks Mr. Semmes himself was there, and rather thinks that Mr. Douglas was down; that witness is not sure whether Mr. Douglas came down but rather thinks that he was there; that the statement contained on the first page of the Marshal's return as to the value of the goods is in his handwriting and he put it there at the time of the transaction, either when all the gentlemen were in the clerk's office at the time the forthcoming bond was given or in his, witness's office; before the witness went into the clerk's office; that it all occurred right there at the time; that they knew about it; that they were either there present with witness at the time or were in the clerk's office.

The COURT: "The question is whether those parties all understood those goods being stated at that value at that time."

The WITNESS: "Absolutely, I am confident of it." Witness further testified that "We were instructed not to make the appraisement, to leave the matter as it stood, that the bond was ample and given for that purpose. The understanding was clear and distinct that the bond took the place of the attachment at the time." The witness further testified that after leaving the conference the witness withdrew the deputy, that witness has a vague recollection, however, that someone was left in charge there over night but is not sure about that. On cross-examination by Mr. Tucker the witness in answer to the question "Did you not tell me the other day in the court house absolutely that no one was left in charge over night at the Semmes-Kelly place" replied "I had a talk with you and perhaps I did say that."

Asked what the fact was the witness replied "I may be mistaken about it but—— Q. (Interrupted.) "Don't you know Mr. Robison that this writ was issued one day and the bond was signed the next day and the discussion arose between you and me as to what was done over night and you said no one was left there? You tried to account for the fact that the writ was dated one day and the bond was dated the next day and I asked you particularly whether anybody was left down there over night to which you replied 'Of course there was nobody left there.'" A. "We did have that conversation, but it was quite vague. I do not know whether I had a watchman there all night or not but I think we did. It was discovered that the bond was not dated until the next day, and that is true."

Q. "Did you also not go to your books and say that there was no charge on your books for the services of anybody remaining down there over night in the way of a watchman? That was one of the reasons you stated that nobody remained in charge of the goods over night. Did you not look up your books for that specific purpose to see if there was any charge for a watchman? A. "I looked up and I was rather surprised that the fact developed that the bond was dated the next day. I did have a recollection that it was all done that night. I know the entire arrangement was made about the bond that night, and I thought the bond was given that night. Now, I only recollect about the watchman business, that naturally we would have had a watchman there unless the transaction was

settled that first night, if it had not been settled that first night the natural thing would have been to have someone in charge until it was settled." The witness further testified that that was an inference upon his part and that his recollection about the whole
41 thing was more or less vague; that there are so many transactions, there is a certain vagueness about it, but witness was convinced about it from his own handwriting in the schedule, the placing in there in his own handwriting of "twenty thousand dollars" and no appraisement being made—that is that appraisement not being signed by the appraisers—that the witness got those figures from some one who had authority to give them to the witness, and released the goods on that; that there is no inference that there was a valuation of twenty thousand dollars placed on the goods; that witness is pretty clear that "we were warned in advance that the writ was coming and in order not to tie up the large business a forthcoming bond releasing the goods would be immediately given; that that came right from Mr. Douglas or some one in his office, witness thinks Mr. Douglas himself.

Thereupon the witness was shown the undertaking and asked where it was signed first, in his office or in the clerk's office. The witness replied "I realize that there is this vagueness about it; I would have been willing to swear that the bond was given on the first evening, which was the 22nd. The bond is dated the 23rd, but I thought it was on the evening of the *23rd*. I have quite a recollection even now, notwithstanding that date, and the vagueness about it, that that bond was given late in the evening of the 22nd, and that those gentlemen were present and that it was given in the clerk's office; by these gentlemen witness refers to Mr. Semmes, Mr. Oscar J. Ricketts and Mr. Donaldson; witness rather thinks that they got Mr. Colbert there at that time. Witness further testified that he did not know definitely whether the undertaking was signed in his office or in the clerk's office; that part of the undertaking is in the clerk's handwriting and part of it in his own; that the title and the number of the case is in witness's handwriting; that witness could not recall whether it was signed in his office or in the clerk's office; that according to witness's best recollection all of the gentlemen named, Mr. Semmes, Mr. Ricketts, Mr. Donaldson and Mr. Colbert were present and signed it in the presence of the witness; that witness could not say whether any one else was present. Witness was then asked when the return was made with reference to the time when the bond was given and replied that the return was in the handwriting of Mr. Beale; that he, witness, did not make the return and does not know the date when it was actually returned; that it states for itself what the return purports to be; that there was an attachment on the 22nd of April, and the bond on April 23rd.

Q. "What I want to get at is when was this paper with the twenty thousand dollar value in it, written in your handwriting, written in reference to the time that the bond was signed"? A. I have the impression that the schedule was made out on the evening of the

levy and that it was not signed by the appraisers because they were estopped by the subsequent agreements of counsel."

The witness further testified that the return was not made until after the undertaking was filed; that "we usually make them immediately after the transaction is closed"; that witness judges
42 it was made on the 23rd; that witness is pretty clear that the paper written by him was written before the bond was given; that witness attached such paper to the writ of attachment before it was filed and then turned it over to the clerk's office; that the paper was turned over to Mr. Beale in whose handwriting the return was, and he made the return, that it is very rarely that witness makes the return.

Thereupon the Plaintiff rested.

Whereupon the United Surety Company moved to direct a verdict in its favor upon the following grounds:

1. The issue joined on the pleadings between the plaintiff and defendant has already been determined by a jury heretofore impaneled and judgment, rendered on such verdict in favor of the plaintiff, which judgment remains of record unreversed and having full force and effect. There is no authority in law, therefore, for the impaneling of another jury and swearing them to try the same issue.

2. There is no authority in law, and no jurisdiction in the court, to impanel and swear a jury in this case to try an issue joined between the plaintiff and the United Surety Company, because the record of the cause does not show that any issue has ever been joined or made between the plaintiff and said United Surety Company.

3. If the record in this case shows that the property of the defendant sought to be seized under the writ of attachment issued herein, was appraised by the marshal (which is denied) the only judgment that could have been legally entered against the United Surety Company, surety on the undertaking given, was for such appraised value. If the record does not show that said property was so appraised, there is no authority in law for such appraisal now to be made, or a valuation of said property now to be made by a jury to be sworn in the cause.

4. There is now of record in this cause an existing judgment against the defendant and there is no statutory or other authority and no jurisdiction in the Court, to enter judgment herein, so far as the United Surety Company is concerned, whatever may be the rights of the plaintiff upon the undertaking signed by said United Surety Company, as a common law undertaking.

5. The plaintiff having elected to take a personal judgment against the defendant for the amount of its claim, and having elected to have that judgment remain of record after the expiration of the term at which it was rendered and after it was vacated as to the United Surety Company, has abandoned and waived its right to a judgment against the United Surety Company upon the undertaking given by it, whereby it undertook to pay any judgment which might be rendered in relation to the attached property.

6. Sec-. 454 and 455 of the Code of Law for the District of Columbia are unconstitutional and void in so far as they permit the entry of a judgment against the surety on an undertaking given thereunder, without permitting him his day in court and deprive him of due process of law to which he is entitled under the Constitution of the United States.

43 7. Under a proper construction and application of that provision of the Constitution of the United States declaring that no person shall be deprived of his property without due process of law, Sec-. 454 and 455 of the Code of Law for the District of Columbia, in so far as they permit a summary judgment to be entered against the surety or a release undertaking in attachment, who has submitted himself to the jurisdiction of the court and promised to pay any judgment of the court in the premises in relation to the property attached, without provision for inquiry as to the value of the property released at which such surety shall have an opportunity to appear and be heard are unconstitutional and void.

8. This court has no power or jurisdiction to proceed further in this cause so far as the United Surety Company is concerned, having exhausted such power and jurisdiction by the entry of the judgment heretofore rendered and the vacation of such judgment as to said company.

Whereupon the court overruled the motion. to which ruling of the court the United Surety Company then and there duly reserved an exception.

Thereupon the United Surety Company called as a witness OSCAR J. RICKETTS, who having been duly sworn testified that he was formely the representative of the United Surety Company. The witness was then shown the release undertaking given in this cause and asked whether he signed it when he was the representative in the District of Columbia of the United Surety Company and replied "Yes." Witness further testified that he signed the paper in his office which was then at 1325 F Street Northwest, that it was brought to him for signature, he thought by a clerk from the office of Douglas, Baker and Sherrill; that witness signed it and took it around to the office of Mr. R. Golden Donaldson, 611 14th Street Northwest; that he signed it there and that witness then came back to his, the witness's office, and telephoned to Mr. Sherrill and asked him what disposition he should make of the paper; that Mr. Sherrill told witness to bring it around to his office and witness did so and left it with him; that witness did not go to the court house at all; that witness did not agree with anybody at the time as to the valuation of the property seized under the writ of attachment; witness was then handed the Marshal's return in the cause, with the paper attached to it in which twenty thousand dollars' worth of goods is mentioned and asked whether he ever saw that paper, that is before he signed the undertaking, and replied "This is the first time I have ever seen it." The witness was then asked whether he agreed with any one that the property should not be appraised and replied, "I had no conversation with any one concerning an appraisement."

In reply to the question "Were you present when any agreement with respect to this property not being appraised was ever made between anybody" replied "I was not."

On cross-examination the witness testified that the firm of Ricketts & Eynon represented the Surety Company at the time the undertaking was signed; that their power of attorney provided
44 there should be two signatures to a bond or undertaking to make it valid; that is to say, if witness signed as agent Mr. Eynon had to sign as attorney in fact, or if Mr. Eynon was not present Mr. Donaldson had to sign. That witness and Mr. Eynon represented the United Surety Company as local agents and were appointed as such; that witness is not sure whether Mr. Eynon was in town at that time; that it is quite evident that he was not, otherwise he would have signed the undertaking with witness; witness could not say whether he was at the court house the day the undertaking was signed and the day before; that he might have been; that the first person who saw witness with regard to making the undertaking was Mr. Wilbur Chesley who was local agent at that time, or one of the firm of Chesley & Chesley, who were the local agents of the Aetna Indemnity Company, another bonding company; that Mr. Chesley first saw the witness about two days before the undertaking was issued.

Q. "You mean before the attachment was issued I presume?" A. "Well I do not know when the attachment was issued. I know the bond was dated April 23rd, 1908, and I had this matter under advisement for a couple of days before, as to going on the undertaging."

Q. "As to whether your company would go upon the bond or not?" A. "Yes, sir."

Witness further testified that Mr. Semmes had seen him the day before the bond was signed and also the day it was signed; witness also saw him at Mr. Sherrill's office and also met him on the street but did not see him at his place of business.

Q. "You saw Mr. Semmes twice then after the attachment had been levied, between the time of the levy of the attachment or the issue of the attachment and the execution of the bond?" A. "Yes, I saw him at least twice."

Q. "Mr. Semmes stated to you did he not that the value of the property in the store that had been attached was far more than the amount of the bond?"

Mr. TUCKER: "If the court please, I do not think what transpired before the execution of the bond is admissible against the Surety Company——

The COURT (interrupting): "It would not be of any consequence unless it leads up to something. I take it this is all as to whether there can be a judgment against the Surety Company."

The witness further testified that he had a conversation with Mr. Semmes concerning the liability, the risk under a bond of this character; that Mr. Semmes said to the witness that he did not believe there was any risk on the bond because the action was not well

founded and the assets of the company were far in excess of the amount attached.

Q. "The property attached was far in excess of the amount of the claim?"

Mr. TUCKER: "He did not say it."

45 The COURT: "He is trying to get him to say it. That is cross-examination.

By the COURT:

Q. "Did he say, that the property attached was more than the claim? Do you remember?" A. "No, he said that the property that the company owned was more than the claim."

The witness further testified that Mr. Semmes told him that the attachment had been levied; but did not tell him what goods had been attached; that Mr. Semmes did not tell witness that he wanted the bond executed at once so as to keep his store from being closed up; that witness inquired of him as to the assets and liabilities of the company as a corporation, and Mr. Semmes replied to that inquiry that they had property aggregating $100,000 in round numbers and that their assets were far in excess of their liabilities and that they were able to meet all just obligations promptly and that this was not a matter of a just obligation; that Semmes signed the application for the bond and delivered it to the witness, whereupon counsel for the plaintiff called for the production of the application and counsel for the Surety Company stated that it was on hand but that the company did not want to be understood as admitting that the application was in any way evidence in the case.

The COURT: "It may be received without prejudice so far as that is concerned. That is you may produce it without any prejudice."

Thereupon the application was produced and it is stipulated that said application was made by the Semmes-Kelly Co. by Charles W. Semmes, President, on April 23, 1908, addressed to the United Surety Company and contained, among others the statement that the Semmes-Kelly Company was worth, over and above all liabilities, One hundred thousand dollars and that it had no debts except those contracted in the course of the general wholesale business.

Witness stated that he thinks the signature to the application is that of Mr. Semmes, that it was accepted as his signature; that it had the corporate seal of the company.

Q. "In addition to the application did Mr. Semmes give you an indemnifying bond to protect you against suretyship?" A. "Yes, sir."

Mr. TUCKER: "I must say I object to it. It cannot possibly have any bearing upon the rights of the plaintiff against the defendant here."

The COURT: "None whatever. It is only so far as it may throw any light on the other question. It is nothing that the jury has anything to do with."

Mr. YERKES: "Not a thing. I understand that fully."

The COURT: "I have allowed this evidence to go in because I do

not think it would prejudice the jury, and it would save time perhaps."

Mr. TUCKER: "Go ahead then."

The witness further testified that the indemnifying bond
46 was given by Mr. Semmes personally; that he made a statement in it first as to his personal assets and witness's best recollection is that he showed himself to be the possessor of property in the neighborhood of $40,000. Asked whether he knew anything about the conversation being held in the court house between representatives of his company and representatives of the Semmes-Kelly Company and of the plaintiff in the case the witness replied "No, sir." He further stated that he did not know anything about it; that at the time he had no one at the court house soliciting bonds in his employ.

The United Surety Company also produced as a witness Mr. R. GOLDEN DONALDSON, who being first duly sworn testified that he was a member of the bar of the District of Columbia and in April, 1908, was counsel for the United Surety Company in all matters pertaining to any business which came up in Washington and with respect to all Federal business. That he was also their attorney in fact to countersign bonds in the absence of either Mr. Ricketts or Mr. Eynon. The release undertaking in the case was then shown to the witness and he identified his signature thereon. Testifying as to the circumstances under which he signed the undertaking the witness said that he signed it at his office, 611 14th Street, Northwest, it having been brought there by Mr. Ricketts; that after signing it witness returned it to Mr. Ricketts and he took it from the office. Witness further testified that he was not at any time at the Court House in connection with the signing of the undertaking and in reply to the question "Did or did you not have any agreement with anybody as to the valuation of the property seized under the writ of attachment mentioned in this undertaking" replied "Absolutely none at any time with anybody." Witness further testified that he had seen in the record of the case the paper attached to the return in which the property is purported to be valued at twenty thousand dollars; that it is in the handwriting of Mr. Robison the deputy marshal; that witness did not see it before signing the undertaking but saw it afterward. Asked whether he knew anything about the value of the property that was to be seized under the writ of attachment the witness replied "Not the slightest," and further stated that he was not called upon in any way to make any inquiry by any one as to its value.

On cross-examination the witness testified that he signed his name to the undertaking for the Surety Company without any knowledge whatever as to the value of the property taken under the attachment; that it was not in his province to inquire into such matters; that they were left to the agent who satisfied himself about that point; that witness signed the undertaking without any knowledge as to whether the property was worth one dollar or fifty thousand dollars; that he had no conversation with anybody interested in the

undertaking except Mr. Ricketts whom he asked about it before he signed it; that the only person to whom he talked was Mr. Ricketts at his, witness's office, and that that was the usual course in signing these bonds; that the witness has signed hundreds of them for the Surety Company; that the witness followed his
47 usual course and signed it after the agent was satisfied with the bond; that witness did not in any case go into the question.

Whereupon W. B. ROBISON, who had testified as a witness for the plaintiff, was called upon for further cross examination and testified as follows, he being examined by Mr. Donaldson for the United Surety Company. The witness was asked the following question: "Do you recall when I came in to see you with reference to the matter, telling you I was investigating the entry of that judgment (meaning the first judgment in the case) with a view of moving to set it aside; that I saw you at your office at the other end of the court house" and replied "I do not doubt it if you say so but I do not recall it." The witness further testified that he did not remember Mr. Donaldson's having the record of the case before him and his calling witness' attention to the paper in his handwriting about the value of the goods at twenty thousand dollars and calling witness' attention to the fact that it was not signed by anybody but stated that possibly Mr. Donaldson had done so.

Q. "Did or did you not tell me at that time that you had taken the bond from them in your office and that you understood under the Code an appraisement was not necessary?" A. "I do not know that I told you that; but I did understand and I do understand now that the appraisement is not essential. I may be mistaken about it."

Q. "You understood then and you understand now that an appraisement is not necessary where you take a forthcoming undertaking. You so understand the law?" A. "Yes I so understand it."

Q. "That is the way you had been interpreting the law in taking these bonds in your office"? A. "I should say yes to that generally but I do not recall another instance of the kind that we have been confronted with."

Q. "And you do not recall my personal conversation with you about the time I moved to set aside this judgment in which you told me that no appraisement had been made because you did not consider it necessary under the law?" A. "No. That did not impress me. I do not recall it."

The witness further testified: "No appraisement was made by the appraisers, and it was the understanding of our office that that bond was to take the place of an appraisement and that there was an agreement somewhere that there was twenty thousand dollars' worth of property there, and when I wrote that schedule out it was based upon there being twenty thousand dollars' worth of property there as was stated to me, for I never saw the goods; I never was at the store and I never would have written that twenty thousand dollars in there, nor made that schedule if it had not been that it was conveyed to me that there was twenty thousand dollars' worth of property there and that the bond was to stand for that."

Q. "After hearing Mr. Donaldson's and Mr. Ricketts' testimony is your recollection refreshed that you had no understanding with them"? A. "I did not testify I had any understanding with Mr. Donaldson or Mr. Ricketts about there being twenty thousand dollars' worth of property there. I do not testify that they were
48 concerned in the information which came to me about there being twenty thousand dollars' worth of property there. That, I take it, came from Mr. Semmes, who told Mr. Cusick—the very Mr. Cusick who was down there representing the office and inspected the entire property and all the goods, and from the general situation that was the conclusion."

Q. "Is not your memory also refreshed by that testimony of Mr. Donaldson and Mr. Ricketts that they were not present at the court house when that bond was brought down there?" A. "It does not refresh my recollection very much, because it is rather vague. Those gentlemen having testified to that I would not be sure—I would not say they were present, but the bond was there. I know their signatures."

Q. "Let me refresh your memory by something else. Don't you remember that Chesley & Chesley, agents for another company were down to your office to talk about, or see about signing this undertaking, and for some reason their company could not sign it and another company had to be obtained"? A. "There are so many bonds taken by our office, and so many interviews that I do not just recall that. It is possible that may have been."

By the COURT:

Q. "If I understand you now, Mr. Robison, you do not say that any representative of the surety company was present and waived the matter of an appraisement"? A. "No, Sir; I do not."

By Mr. YERKES:

Q. "Was not that your recollection before that, that had occurred just as you testified"? A. "That was my recollection, yes, sir, as I testified this morning. Perhaps it may have been based upon examining the bond and charging my recollection to the best of my ability—I do know that there were a number of gentlemen present there on the occasion; and when the bond finally came to me there were several there, and I waited until I had the approval of Mr. Colbert, representing the plaintiff in the case."

Q. "On the afternoon before, when Mr. Cusick, your deputy, was down there at that place with the appraisers were not there at that time representatives of these parties in your office"?

The COURT: "The surety company is what we want to know about."

By Mr. YERKES: "Of the surety company in your office when you called up Mr. Cusick?"

A. "I take it they must have been there, because I would not have called Mr. Cusick if we had not the authority upon that point. I would not have stopped the proceedings; I could not have stopped the proceedings without the authority upon that point."

The COURT: That is not the question at all, the authority upon that point. They have the bond here, and we know the bond was given. We know it is here. The question he is trying to find out is whether there was a waiver by his surety company of an
49 appraisement, whether any officer or attorney of the company there undertook to waive that."

The WITNESS: "Well, I am convinced that there was. I cannot testify clearly as to it. I am perfectly convinced that there was."

Thereupon Mr. Tucker asked the witness if he recollected whether he ever saw Mr. Ricketts personally or Mr. Donaldson personally about the matter and he replied "I was so sure when I was thinking over it that I would have been willing to testify under oath almost that that bond was signed on the evening of the 22nd rather than on the 23rd. I recollect of several gentlemen being present and a general agreement and understanding that that bond was to stand for the property, and that that twenty thousand dollars was agreed upon, and was a part of it, or I would not have put it upon that schedule. Now, of course, I am vague about just what gentlemen were there. I thought I was sure about it, but I am not; I find I am not."

Asked whether he was perfectly sure now that the bond was given the day after Mr. Cusick was sent down there to levy the attachment he replied "I am not satisfied, notwithstanding it is dated on the 23rd. I rather have the impression that the bond was signed on the 22nd and that we held it over until the 23rd, until it was approved by Mr. Colbert. I may be mistaken about that, but I am thoroughly convinced in my own mind that this whole business was transacted on the evening of the 22nd, late in the evening, after office hours, notwithstanding the bond is dated the 23rd." It was at least five o'clock in the evening before we got through with it, or later. Perhaps Mr. Semmes will recollect that, with me, that it was late in the evening. Certainly he was there."

Thereupon CHARLES W. SEMMES, called as a witness by the United Surety Company and being first duly sworn, testified that he was president of the defendant company; that the defendant company has been adjudged a bankrupt; that when it was advised it was necessary to give the undertaking the matter was taken up with Douglas, Baker & Sherrill, and they suggested the firm of Chesley & Chesley who were issuing bonds, to go on the undertaking; that witness met a representative of Chesley & Chesley, or Mr. Chesley himself, in Mr. Robison's office, with a representative from Douglas, Baker & Sherrill's office; that witness did not know until he arrived there that Mr. Chesley was not in a position to write the undertaking; that it was then necessary to get some one else and Mr. Ricketts was secured; at Mr. Chesley's suggestion; that witness did not take Mr. Ricketts to the court house but witness went to see him at his office; that Mr. Ricketts signed the underaking in his, Ricketts' office and witness then thinks Ricketts took charge of it or it was turned over to the defendant's attorneys. Witness did not see the undertaking after that time; that no arrangement was made with

Mr. Ricketts or any understanding had with him as to whether or not there should be an appraisement of the property; that witness was not present when Mr. Donaldson signed the undertaking;
50 that witness had no understanding or agreement with anybody connected with the United Surety Company whereby it was agreed that no appraisement of the property should be made.

On cross-examination the witness testified that about the time the undertaking was executed the witness executed an indemnifying bond to the surety company but does not recall whether it was before or after the execution of the undertaking; that under the indemnifying bond witness stands bound to pay to the United Surety Company any amount it might pay to the plaintiff on the undertaking; that after the undertaking was given the witness also signed the application to the United Surety Company in which he stated that the assets of the Semmes-Kelly Company were worth over and above liabilities, $100,000; that possibly the application was signed the same day or within the same hour; that the Semmes-Kelly Company in addition to its stock of goods and bills receivable had real estate; that it had in connection with the cider business spent about $25,000 in promoting it and that that was considered an asset because the expense leading up to that had been withdrawn to some extent at that time; that is to say it had advertised itself and worked around in the different sections of the country; that the Semmes-Kelly Company went into bankruptcy a year or two after the undertaking was given; that witness was not at the store of the company when the marshal arrived with the writ of attachment, but came in afterwards; that they got witness on the street, telephoned him and told him the marshal was there and witness went to the store and found Mr. Cusick there.

Q. He had levied this attachment?"

A. "He was in my office when I got there."

Witness further testified that he did not recall that Mr. Cusick asked him as to the value of the stock of goods and did not recall that he told him it was worth very much more than $20,000, but will not say that he did not so tell him. That witness did not take Mr. Cusick through the store and show him the goods but possibly Cusick was taken through.

Q. "Your stock of goods in fact was worth very much more than $20,000?"

A. "It was."

Q. "It was at the time the attachment was levied upon it?"

A. "Yes, sir."

The witness further testified that he did not know the attachment was to be levied that day but anticipated something of the kind to come, but cannot say that he had tried to make arrangements for a bond before the attachment was actually issued; that the matter was entirely in the hands of counsel, the details having been left to them; that counsel had not notified witness that the attachment would be issued and witness had not seen Chesley & Company; that Douglas, Baker & Sherrill attended to that.

Thereupon the United Surety Company gave evidence tending to

support the pleas of set-off filed by the defendant in the case, in the sum of $4,310.12.

The foregoing was in substance all of the evidence produced by the parties upon the question of the liability of the United Surety Company upon the undertaking in the case.

51 Thereupon the United Surety Company requested the court to grant the following special instructions to the jury:

1. The jury are instructed that upon the whole evidence they should return a verdict for the United Surety Company.

2. The jury are instructed that upon the whole evidence they should return a verdict for the defendant.

3. The jury are instructed that if they find from the evidence that the plaintiff agreed to sell to the defendant 3,000 barrels of fortified juice at 8½ cents per gallon to be taken out of the mill of the plaintiff on or before October 1st, 1907, and that prior to said last mentioned date all of said barrels of fortified juice were delivered to the defendant except 1,405 barrels; that said 1,405 barrels contained approximately 65,234 gallons of fortified juice; that on or before the said first day of October, 1907 the defendant ordered and directed the plaintiff to deliver to it the defendant the said 1,405 barrels of fortified juice but the plaintiff failed and refused to do so; and if the jury shall further find that after said October 1, 1907 the plaintiff did deliver to the defendant the said 1,405 barrels of fortified juice, or any of them, and is now charging for the same in this suit at the rate of 10½ cents a gallon, it is not entitled to recover for the same at the rate in excess of 8½ cents per gallon.

4. The jury are further instructed that if the plaintiff agreed to sell the defendant 3,000 barrels of fortified juice at the rate of 8½ cents per gallon, the same to be taken from the plaintiff's mill on or before October 1, 1907; that between September 25, 1906 and October 1, 1907 the plaintiff delivered to the defendant 1,595 barrels of said juice containing 74,054 gallons; that on or before October 1, 1907 the defendant ordered and directed the plaintiff to deliver to it the balance of said 3,000 barrels of said juice, to wit, 1,405 barrels and that the plaintiff failed and refused so to do; and if the jury further believe that the reasonable market value of said fortified juice after October 1, 1907 was 10½ cents per gallon; then the defendant is entitled to set-off against the plaintiff's claim in the sum of $1,304.68.

6. The jury are instructed that if they find for the plaintiff they are to determine whether, under all the circumstances of the case, interest shall be allowed upon whatever amount shall be found to be due the plaintiff, and the date from which such interest, if any, shall be payable.

Whereupon the court refused to grant said prayers numbered 1, 2, 3, 4, and 5, to which ruling of the court in refusing to grant each and every of said prayers the United Surety Company, before the jury retired duly noted an exception.

The Court granted the foregoing prayer numbered 6.

Thereupon the Court charged the jury as follows:

Gentlemen of the Jury: A good deal of testimony that has

been given before you will not be helpful to you in deciding the questions that are to be submitted. Many questions that were raised at one time or another during the case have gone out, some of them have been waived by the parties, and some of them have been
52 ruled out by the Court, and now the issue as submitted to you is very simple.

I will give you the figures of what the defendant claims and of what the plaintiff claims on a slip of paper, so that you can take that paper into the jury room with you Counsel can see if they gave the right amounts in their argument. The plaintiff claims to recover $9,937.20. The defendant claims, by way of setoff, $4,310.12. Both parties claim interest upon those amounts, and each party claims that the other party ought not to have interest.

That is the situation as it presents itself to you now, at the close of the trial.

You must treat this case on the evidence bearing upon the question involved here, not upon guesswork, not conjectures, or prejudices or sympathies, but simply upon the evidence.

The defendant sets up an off-set here, and stands in regard to that off-set as the plaintiff, and, for that reason, had the opening and close in the arguments before you.

What the defendant claims, as you know, is that it paid for a large amount of sugar to be put in this product that was not put in; that is, it was overcharged to the extent of two-fifths of these bills that have been produced here, and that amount is $4,310.12. Now, if you find that those bills were paid, and if you believe that the two-fifths of the sugar paid for that was to go into the product, did not go into it, so that the defendant has overpaid the plaintiff this sum of $4,310.12, of course, it ought to be allowed that.

The question is: Is that made out by a fair balance of the testimony? Is it made out that they paid these bills; is it made out by a fair balance of the testimony that they did not get the two-fifths of that sugar? The testimony stands there in conflict; on the one hand, the testimony of the superintendent that he had the oversight of this matter, and that the 50 pounds per barrel was used; on the other hand, the government analyses and the analyses of the two chemists made in the way stated by them, as tending to show that the amount of alcohol found in the product indicated only 30 pounds per barrel was used.

To keep in mind the evidence that was given: The testimony of the experts is not impeached in any way; it is not contradicted by the testimony of other experts. No question is made about their capacity to testify to what they did. It is suggested that their tests were made under other conditions than those that prevail at the factory. They were asked about that—Professor Hird, at least was, and he said it was true that that difference in conditions would make some difference, but that the conditions at the factory would tend to produce more alcohol than would be produced at the laboratory. That is all the evidence there is upon the subject, and, if that is true, it would indicate as I understand, a smaller amount of sugar rather than a larger amount as having been used in the product. It is

purely a question of fact, for you, upon all the testimony, considering all the circumstances in the case that bear upon the question.

53 If you find that this letter was written by the Company, and written by one who knew the fact, or under instructions from those who did know the fact, and in an important matter where the truth was important to be ascertained, you have a right to weigh that as evidence tending to show that the amount used per barrel was only 30 pounds. But it is a question of fact after all. If you believe notwithstanding all the evidence, that fifty pounds per barrel was used, or if you are not satisfied by a fair balance of the testimony that 50 pounds were not used, then the defendant has failed to make out his claim of off-set.

Now, as to interest, where a contract calls for interest the jury have nothing to do with the question. The interest is allowed as a matter of law; but it seems to be the law of this District that where the contract does not call in terms for interest, it is only allowable in the discretion of the jury for the wrongful detention of the money after it ought to have been paid, and to be allowed from such date as the jury find it should have been paid. If you are satisfied that this defendant owes the plaintiff an amount which you find beyond all question, and has wrongfully neglected to pay that amount, you will be fully justified in allowing, by way of damages for the detention of the money, the interest, not exceeding the legal rate, from that time. Of course, if you treat the parties both alike on the subject of interest, and make the deduction as of April 1907, if you allow the defendant's off-set, then you would ordinarily allow interest on the balance from that time, because the defendant, in that way, would be allowed interest. The plaintiff's claim is cut down at that date by allowing the off-set as of that date; but it is for you to say whether the defendant's right to interest is superior to the plaintiff's right to interest under the circumstances, and you may adjust that item of interest as you think justice requires in this case.

You need not find separately as to what interest you allow, but you may compute the interest and add it to the sum you find, and return one lump sum as your verdict under these instructions.

Interest is claimed here from 1907——

Mr. TUCKER: 1908, your honor.

The COURT: 1908.

Mr. TUCKER: Yes; 1908. I said 1907 once.

The COURT: Yes. I took it from your statement. Does that sufficiently cover the issues that were submitted?

Mr. TUCKER: I do not think it will aid the jury in this case at all to take the declaration and set-off.

The COURT: I do not think they need it at all.

Mr. TUCKER: We have prepared the figures which, with Mr. Yerkes' consent, they might take. It is simply a matter of making it clear.

Mr. YERKES: We certainly have no objection to that.

The COURT: All right; you can give it to the jury then. You may take the case, gentlemen.

All of the foregoing objections and exceptions were duly noted at the time when made and reserved by the Court; and counsel
54 for the United Surety Company then and there prayed the Court to sign and seal this Bill of Exceptions, and at the request of counsel for the said United Surety Company the same is hereby signed and made a record of this case, now for then, this 15th day of October, 1912.

WENDELL P. STAFFORD, *Justice.*

Assignment of Errors.

Filed October 15, 1912.

* * * * * * *

The United Surety Company of Baltimore, Maryland, assigns errors to the rulings, holdings and action of the Court herein as follows:

1. The Court erred in overruling the objection of the United Surety Company to the swearing and impaneling of the jury for the following reasons:

(*a*) The issue joined in the issue between the plaintiff and the defendant has already been determined by a jury impaneled and judgment rendered on such verdict in favor of the plaintiff which judgment remains of record unreversed and having full force and effect. There is no authority in law, therefore, for the impaneling of another jury and swearing them to retry the same issue.

(*b*) There is no authority in law, and no jurisdiction in the Court, to impanel and swear a jury in this case to try an issue joined between the plaintiff and the United Surety Company, because the record of the cause does not show that any issue has ever been joined or made between the plaintiff and said United Surety Company.

(*c*) If the record in this case shows that the property of the defendant sought to be seized under the writ of attachment issued herein, was appraised by the marshal, (which is denied) the only judgment that could have been legally entered against the United Surety Company, surety on the undertaking given, was for such appraised value. If the record does not show that said property was so appraised there is no authority in law for such appraisal now to be made, or a valuation of said property now to be made, by a jury to be sworn in the cause.

(*d*) There is now of record in this cause an existing judgment against the defendant and there is no statutory or other authority and no jurisdiction in the Court, to enter judgment herein, so far as the United Surety Company is concerned, whatever may be the rights of the plaintiff upon the undertaking signed by said United Surety Company, as a common law undertaking.

(*e*) The plaintiff having elected to take a personal judgment

against the defendant for the amount of its claim, and having elected to have that judgment remain of record after the expiration of the term at which it was rendered and after it was vacated as to the United Surety Company, has abandoned and waived its right
55 to a judgment against the United Surety Company upon the undertaking given by it, whereby it undertook to pay any judgment which might be rendered in relation to the attached property.

(*f*) Section- 454 and 455 of the Code of law for the District of Columbia are unconstitutional and void insofar as they permit the entry of a judgment against the surety on an undertaking given thereunder, without permitting him his day in court and deprive him of due process of law to which he is entitled under the Constitution of the United States.

(*g*) Under a proper construction and application of that provision of the Constitution of the United States declaring that no person shall be deprived of his property without due process of law, Sections 454 and 455 of the Code of Law for the District of Columbia, insofar as they permit a summary judgment to be entered against a surety on a release undertaking in attachment, who has submitted himself to the jurisdiction of the Court and promised to pay any judgment of the Court in the premises in relation to the property attached, without provision for an inquiry as to the value of the property released, at which such surety shall have an opportunity to appear and be heard, are unconstitutional and void.

(*h*) This court has no power or jurisdiction to proceed further in this cause so far as the United Surety Company is concerned, having exhausted such power and jurisdiction by the entry of the judgment heretofore rendered and the vacation of such judgment as to said company.

2. The Court erred in ruling and holding that the order of October 21, 1910 (order of Mr. Justice Barnard setting aside as to the United Surety Company the verdict of May 29th, 1910, and the judgment of May 25th, 1910) operates in law to set aside the verdict and judgment as to the principal as well, and in ordering trial to proceed de novo:

(*a*) Because the said ruling and order were made and passed without notice to the said principal or to the United Surety Company and without an opportunity for the said principal to defend said action or object to said ruling and order.

(*b*) Because the Court was without authority or jurisdiction to set aside or disturb the said judgment of May 25th, 1910, as to the principal, in that the term at which said judgment was entered and enrolled had passed.

(*c*) Because the order of Mr. Justice Barnard in setting aside, as to the United Surety Company, the verdict of May 19th, 1910, and the judgment of May 25th, 1910, do not operate in law to set aside the verdict and judgment as against the principal also, but that said verdict and judgment still remains of record unreversed, and is still in full force and effect.

3. The Court erred in overruling the objection of the United

Surety Company to the testimony of the witness, Gilbert N. Treble offered by the plaintiff in attempting to prove the filling of orders by the plaintiff for the defendant, the Semmes-Kelly Company, which orders covered merchandise which was the basis of the
56 suit, and in overruling the objection of the United Surety Company to the introduction of all testimony tending to prove the amount due from the Semmes-Kelly Company to the plaintiff for the following reasons:

(*a*) Because the amount of said indebtedness had theretofore been found and determined by the verdict of a jury in this cause and a judgment rendered on said verdict at a term which had expired.

(*b*) Because said evidence was offered and received without notice to the Semmes-Kelly Company and without an opportunity for said Semmes-Kelly Company to defend this case.

(*c*) Because the United Surety Company could not be bound by the amount of said indebtedness and there could be no issue between the plaintiff and the said United Surety Company as to the amount of said indebtedness.

(*d*) Because the said evidence was inadmissible as against the United Surety Company in that no valid judgment could be entered against said company, under the statute, except a judgment in relation to the property attached and for the appraised value thereof.

(*e*) Because there was no issue which could be proved by the said testimony in that the plaintiff had elected to take a personal judgment against the Semmes-Kelly Company and had thereby waived and abandoned any claim it might have against the United Surety Company on the undertaking given to release the property attached.

4. The court erred in allowing the witness Cusick to testify, over the objection of the United Surety Company, as to what was done in the execution or levy of the writ of attachment issued in the case for the following reasons:

(*a*) The statute does not provide for inquiry by the jury into the circumstances under which a writ of attachment is levied.

(*b*) That the testimony of the witness as to what was done in levying the attachment or following the levy of the attachment tends to impeach and contradict the record in the case.

(*c*) There is no statutory authority for the trial of any such issue as to such circumstances by the jury that is sworn to try the issue joined between the plaintiff and the defendant, the Semmes-Kelly Company, in this case, and no authority to try any issue between the plaintiff and the United Surety Company especially if, as in this case, no such issue has been made up and no provision is made by law for such an issue to be made up.

5. The Court erred in allowing the witness Cusick to testify, over the objection of the United Surety Company, to the conversations had by him with Mr. Charles W. Semmes, the President of the Semmes-Kelly Company, and with the United States Marshal's office, on the ground that the alleged conversations having transpired in the absence of the United Surety Company, or any of its representatives, the testimony was not binding in any way upon the United Surety Company, nor admissible against it.

6. The Court erred in overruling the motion of the United Surety Company to strike out all of the testimony of the witness Frederick Cusick in relation to what Mr. Semmes said to him in relation
57 to the value of the stock of goods of the Semmes-Kelly Company because the alleged conversation had between the witness Cusick and Mr. Semmes transpired in the absence of the United Surety Company, or any of its representatives, and was in no way binding upon it, or admissible against it.

7. The Court erred in refusing to grant the first prayer offered by the United Surety Company directing the jury to return a verdict for the United Surety Company at the close of all the testimony for the reasons stated in assignment numbered 1 above, and, in addition thereto:

(*a*) Because there was no testimony tending to show any appraisement of the property attached and released by the undertaking given to release said property.

(*b*) Because even if it were permissible for the jury to find by a verdict the value of the property attached (which is denied) in order that the liability of the United Surety Company upon the undertaking given by it, might be thereby fixed, there was no evidence tending to show the value of said property.

(*c*) Because under the evidence the jury could only find the amount due from the Semmes-Kelly Company to the plaintiff, and there was nothing in the record or in the testimony on which the jury could have found a verdict or the Court could have entered a judgment in relation to the property attached, while under the statute authorizing said undertaking the said United Surety Company could only be liable for the judgment in relation to the said property.

(*d*) Because if Sections 454 to 456, both inclusive, of the Code of Laws of the District of Columbia, should be construed so as to permit of a judgment against the United Surety Company, without an appraisement of the property attached, or the evidence of their value by the jury, then the said sections are unconstitutional and void in that they deprive the said surety of its property without due process of law.

8. The Court erred in overruling the motion of the United Surety Company for the arrest of the judgment for the following reasons:

(*a*) That, as the record shows there was no appraisement of the value of the defendant's property at or after the issue of the writ of attachment herein, the court had no jurisdiction to enter a judgment against the surety on the undertaking given by the United Surety Company.

(*b*) That, even if it were permissible for the jury to find by the verdict the value of the property of the defendant before or after the issue of the writ of attachment herein, in order that the liability of the United Surety Company upon the undertaking given by it might be thereby fixed (which is denied) as said value was not fixed by the verdict found by the jury, the court was, therefore, without jurisdiction to enter a judgment on said verdict against said company.

(*c*) That as the liability of the said United Surety Company upon

the undertaking given by it is limited by the terms thereof, to abiding by and performing any judgment which may be rendered in relation to the attached property, and as the verdict of the jury merely found the amount due from the defendant to the plaintiff, without any finding in relation to said property, the court had no jurisdiction to enter any judgment on said verdict against said United Surety Company.

(*d*) That section- 454 to 456, both inclusive, of the Code of Laws for the District of Columbia are unconstitutional and void under that provision of the Constitution of the United States, which declares that no person shall be deprived of his property, without due process of law, in so far as they attempt to permit or do permit a judgment against the Surety upon an undertaking given in said section 454 to abide by and perform any judgment in relation to attached property upon the release of the same from the right of attachment without the submission to a jury of any question of fact relating to said property; or if said sections are to be construed as permitting a judgment to be rendered against such a surety for the appraised value of such property, and are valid and constitutional to that extent then, upon a proper construction and application of said provision of the Constitution to this case, the rendition of a judgment herein for the value of said property, without the submission of the question of its value to a jury, would be a violation of said provision of the Constitution in that the record shows that there was no appraisement of the said value.

9. The court erred in entering a judgment for the plaintiff in the amount of Nine Thousand, nine hundred and thirty-seven Dollars and twenty cents ($9,937.20), or in any other amount, for the reasons set forth in the foregoing assignment of errors.

10. The court erred in other respects apparent of record.

R. GOLDEN DONALDSON,
CHARLES C. TUCKER,
Attorneys for the United Surety Co.

Designation of Record.

Filed October 15, 1912.

* * * * * * *

For the purposes of the appeal prayed and allowed herein on the 25th day of June, 1912, the Clerk will please prepare the transcript of record, including therein, the following:

1. Declaration, particulars of demand and affidavit (in full).
2. Undertaking as security for costs (memorandum).
3. Bond in attachment (memorandum).
4. Writ of attachment showing the return with all accompanying papers (in full), and endorsements.
5. Undertaking given for release of attached property (in full).
6. Pleas and affidavit of defense (in full), joinder in issue and note of issue and notice of trial (in full).

7. Verdict for plaintiff $8,748.29 (in full).
8. Judgment (in full).
8½. Memo. of fi. fa. and attachment.
59 9. Motion to stay execution and vacate judgment by United Surety Company (in full), with affidavits for and against motion.
9½. Order staying execution.
10. Order setting aside verdict and judgment as to United Surety Company (in full).
11. Opinion of Mr. Justice Barnard (in full).
12. Objections of United Surety Company to impaneling and swearing the jury (in full).
13. Order overruling objection to swearing and impaneling of jury (in full).
14. Verdict for plaintiff for $9,937.20 (in full).
15. Motion for arrest of judgment (in full).
16. Motion for judgment (in full).
17. Order overruling motion in arrest of judgment and entering judgment, allowing appeal, fixing penalty of appeal bond, etc. (in full).
18. Bill of exceptions (in full).
19. Order signing and sealing bill of exceptions.
20. Memorandum of appeal bond.
21. Assignment of errors (in full).
22. This designation (in full).

R. GOLDEN DONALDSON,
CHARLES C. TUCKER,
Attorneys United Surety Company.

This designation is O. K.
JOHN J. HAMILTON.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 119, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50482 at Law, wherein American Fruit Product Company, &c. is Plaintiff and the Semmes-Kelly Company, &c. is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of November, 1912.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2480. The United Surety Company, a corporation, appellant, vs. American Fruit Product Company, a corporation. Court of Appeals, District of Columbia. Filed Nov. 15, 1912. Henry W. Hodges, Clerk.

60 THURSDAY, March 6th, A. D. 1913.

No. 2480.

THE UNITED SURETY COMPANY, a Corporation, Appellant,
vs.
AMERICAN FRUIT PRODUCT COMPANY, a Corporation.

The argument in the above entitled cause was commenced by Mr. A. H. Ferguson, attorney for the appellant, and was continued by Mr. J. J. Hamilton, attorney for the appellee, and was concluded by Mr. C. C. Tucker, attorney for the appellant.

61 No. 2480.

THE UNITED SURETY COMPANY, a Corporation, Appellant,
v.
AMERICAN FRUIT PRODUCT COMPANY, a Corporation, Appellee.

Opinion.

Mr. Justice Van Orsdel delivered the opinion of the Court:

Appellee brought an action in the Supreme Court of the District of Columbia on an account against the Semmes-Kelly Company, a corporation doing business in the District of Columbia. A writ of attachment was issued, on which was indorsed the marshal's return: "Attached as per schedule herewith and served defendant with a copy of this writ and notice prescribed by section 446 of the Code. April 22, 1908." Attached to the return was the following schedule: "Large stock of merchandise, groceries, canned goods, etc., located at store—premises No. 614-616 Penn. Ave.—valued at $20,000."

The following day an undertaking was filed to release the attached property. It was signed by the Semmes-Kelly Company,
62 hereafter called defendant, and appellant, the United Surety Company. The obligation of the bond is as follows: "The defendant, and United Surety Company of Baltimore, Md., surety, in consideration of the discharge from the custody of the marshal of the property seized by him, upon the attachment sued out against the defendant, on the 22d day of April, A. D. nineteen hundred and eight, in the above-entitled cause, appearing and submitting to the jurisdiction of the court, hereby undertake * * * to abide by and perform the judgment of the court in the premises in relation to said property, which judgment may be rendered against all the parties whose names are hereto subscribed." The property was released

to defendant, and the giving of the bond noted on the marshal's return.

Issue was joined on the pleas of plaintiff and defendant, and on trial the jury returned a verdict for plaintiff for the sum of $8,748.29. A judgment was entered "that the plaintiff herein recover of defendant herein and the United Surety Company of Baltimore, Md., its surety, the sum of twenty thousand dollars ($20,000), appraised value of the property herein attached, and upon payment by said defendant and its surety, to said plaintiff of the sum of eight thousand, seven hundred and forty-eight dollars and twenty-nine cents ($8,748.29), together with interest thereon from the 9th day of November, 1907, as aforesaid found due by said defendant to said plaintiff, by reason of the premises, and costs of suit, for which execution shall be had; it is ordered that the undertaking filed herein April 23, 1908, be discharged and released."

A motion to stay execution and vacate the judgment was filed by appellant. The court, on consideration of the motion, "ordered that the verdict rendered herein May 19, 1910, and the judgment thereon, entered May 25, 1910, be, and they are hereby, set aside, vacated, and for nothing held as against said United Surety Company, unless the plaintiff shall within ten days hereof file herein 'a remittitur to all of its said judgment and interest in excess of $4,842.15 with interest thereon from February 1, 1908, and costs,'—whereupon, the plaintiff by its attorneys of record, in open court, declining to file such remittitur, said verdict and judgment are hereby set aside, vacated and for nothing held as to said United Surety Company." It was then ordered that the cause be placed upon the trial calendar. It is unnecessary to look into this judgment, since it was within the discretion of the court to set it aside, and, as the action was taken at the instance of appellant, it is in poor situation to complain.

When the case was reached for second trial, appellant interposed the objection that, inasmuch as the former judgment had not been vacated as to the defendant, and said judgment as to defendant "remains of record unreversed and having full force and effect, there is no authority in law, therefore, for the impaneling of a jury and swearing them to retry the same issue," and that the court was without jurisdiction to proceed further in the case, inasmuch as no issue had been joined between plaintiff and appellant company. This objection was overruled by the court, and on verdict for plaintiff judgment was entered against appellant and defendant jointly for the sum of $9,937.20, from which judgment this appeal was taken.

Where property in this jurisdiction is attached in the possession of the owner, and a bond given for its release, no appraisement is required. The only provision of law which seems to imply the necessity of an appraisement is found in section 455 of the Code, which provides that, "if the property attached be delivered to the defendant upon his executing an undertaking as aforesaid, and judgment in the action shall be rendered in favor of the plaintiff, it shall be a joint judgment against both the defendant and his surety or sureties in said undertaking for the appraised value of the property." In the absence of a more specific statutory require-

ment for an appraisement, we are disposed to rule that a formal appraisement is not required. We think that the appraisement referred to as a limitation upon the amount of the judgment that may be rendered against the surety only applies where the value of the property attached is not sufficient to satisfy the amount of the judgment in favor of the attaching creditor. In that instance, as the surety could only be held for the value of the attached property, the court should ascertain the value of the property, and accordingly enter judgment against the surety. But this contingency does not concern us, since the value of the property is conceded to be far in excess of the judgment.

There was no error in overruling the objection of the appellant to the second trial, on the ground that the first judgment was not vacated as to defendant. The common law rule prevails in this country, to the effect that where a judgment against several defendants is vacated and a new trial granted as to part, the judgment as to all is set aside. Hanley v. Donoghue, 59 Md., 239; Van Renselaer v. Whiting, 12 Mich., 449; Long v. Garnet, 45 Tex., 400; Hughes v. Lindsey, 10 Ark., 555; Richards v. Walton, 12 Johns. (N. Y.), 434.

Neither was there error in overruling the objection of appellant to the second trial on the ground that no issue had been joined between plaintiff and appellant. The issue to be tried was the one joined between plaintiff and defendant, to which appellant was not a party, unless it had proper grounds for becoming such under section 460 of the Code. Appellant's only relation to the original suit was through its contract to abide by and perform the judgment that should be rendered against defendant. Of course, if the judgment was procured by fraud or collusion between plaintiff and defendant, appellant can avail itself of this defense when called upon to respond to the judgment. But no claim of fraud has been made in this case.

But it is urged that the attachment law is unconstitutional in so far as the form of undertaking required by section 454 of the Code prescribes for the submission of the parties to the undertaking to the jurisdiction of the court, with an agreement on their part to abide by and perform the judgment of the court in relation to the property attached, while section 455 provides that, in the event of judgment in favor of the plaintiff, it shall be joint "against both the defendant and his surety or sureties in said undertaking for the appraised value of the property." It was held by this court in Tenney v. Taylor, 1 App. D. C., 223, that a provision in an appeal bond "to
63 abide by, perform, and pay the judgment of the court" was not equivalent to a waiver of process or submission to the jurisdiction of the court. In other words, it was held that the mere undertaking to perform the judgment of the court did not confer jurisdiction to render judgment against the surety.

But here we have a different case. An attachment or appeal bond is a contract. Where the surety, by express agreement in the bond, as in this case, agrees to submit to the jurisdiction of the court and abide by and perform the judgment of the court, it is equivalent to a waiver of process and submission to the jurisdiction of the court. Where the statute provides for summary entry of judgment against

the surety, and, by the terms of the bond, he has submitted himself to the jurisdiction of the court for that purpose, no fact remains to be ascertained to render the surety liable, and a separate action on the bond is unnecessary. Moore v. Huntington, 17 Wall., 417; Johnson v. Chicago & Pac. El. Co., 119 U. S., 388; Hopkins v. Orr, 124 U. S., 510.

This question was fully passed upon in Beall v. New Mexico, 16 Wall., 535. In that case the court was considering the validity of a judgment upon an appeal bond entered under a statute similar to ours, which provided that "in case of appeal in civil suits, if the judgment by the appellate court be against the appellant, it shall be rendered against him and his securities on the appeal bond." Sustaining the validity of the judgment, the court said: "The first error assigned is that judgment was entered by the Supreme Court against the sureties of the appeal bond as well as against the appellants below. This point depends upon the question whether the statute of the Territory authorizing such a judgment is a valid one or not. As the legislative power of the Territory, by the organic act, extends to all rightful subjects of legislation consistent with the Constitution of the United States, it would seem to extend to such a case as this. A party who enters his name as surety on an appeal bond does it with a full knowledge of the responsibilities incurred. In view of the law relating to the subject it is equivalent to a consent that judgment shall be entered up against him if the appellant fails to sustain his appeal. If judgment may thus be entered on a recognizance, and against stipulators in admiralty, we see no reason in the nature of things, or in the provisions of the Constitution, why this effect should not be given to appeal bonds in other actions, if the legislature deems it expedient. No fundamental constitutional principle is involved; no fact is to be ascertained for the purpose of rendering the sureties liable, which is not apparent on the record itself; no object (except mere delay) can be subserved by compelling the appellees to bring a separate action on the appeal bond." If this is the law as to appeal bonds, it is not apparent why the Congress may not extend similar jurisdiction over sureties upon attachment bonds.

Error is assigned in admitting the testimony of the witness Cusick, the deputy United States marshal who served the writ of attachment. The testimony was to the effect that he telephoned the marshal's office from the building where the attached property was located, and was asked by the chief deputy marshal how long it would take to make an appraisement of the property, to which witness replied that it would take at least two or three days, whereupon the chief deputy instructed him over the phone not to have the appraisement made, but to inquire of Mr. Semmes if he had $20,000 worth of stock there; that witness made the inquiry, "and Mr. Semmes said, 'Yes; I have a great deal more.'" It is unnecessary to determine the admissibility of this evidence, for, if inadmissible, it could not constitute reversible error, inasmuch as it related solely to the value of the property attached, which, it is conceded, was far in excess of the amount of the judgment.

The judgment is affirmed with costs.

Affirmed.

64 MONDAY, April 7th, A. D. 1913.

No. 2480, April Term, 1913.

THE UNITED SURETY COMPANY, a Corporation, Appellant,
vs.
AMERICAN FRUIT PRODUCT COMPANY, a Corporation.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE VAN ORSDEL.

April 7, 1913.

65 Court of Appeals of the District of Columbia, January Term, 1913.

No. 2480.

THE UNITED SURETY COMPANY, a Corporation, Appellant.
vs.
AMERICAN FRUIT PRODUCT COMPANY, a Corporation.

Petition for Writ of Error.

To the Chief Justice and the Associate Justices of said Court of Appeals of the District of Columbia:

Your petitioner, the United Surety Company, a corporation, the appellant in the above entitled cause, by its attorneys of record, respectfully shows unto the Court as follows:—

1. That among other assignments of error on the appeal to this Court from the Supreme Court of the District of Columbia were the following:—

1. (*f*) Section- 454 and 455 of the Code of law for the District of Columbia are unconstitutional and void in so far as they permit the entry of a judgment against the surety on an undertaking given thereunder, without permitting him his day in court and deprive him of due process of law to which he is entitled under the Constitution of the United States.

1. (*g*) Under a proper construction and application of that provision of the Constitution of the United States declaring that no person shall be deprived of his property without due process of law,

66 Sections 454 and 455 of the Code of Law for the District of Columbia, in so far as they permit a summary judgment to be entered against a surety on a release undertaking in attachment, who has submitted himself to the jurisdiction of the Court

and promised to pay any judgment of the Court in the premises in relation to the property attached, without provision for an inquiry as to the value of the property released, at which such surety shall have an opportunity to appear and be heard, are unconstitutional and void.

7. (*d*) Because if Sections 454 and 456, both inclusive, of the Code of Laws of the District of Columbia, should be construed so as to permit of a judgment against the United Surety Company, without an appraisement of the property attached, or the evidence of their value by the jury, then the said sections are unconstitutional and void in that they deprive the said surety of its property without due process of law.

8. (*d*) That section- 454 to 456, both inclusive, of the Code of Laws for the District of Columbia are unconstitutional and void under that provision of the Constitution of the United States, which declares that no person shall be deprived of his property, without due process of law, in so far as they attempt to permit or do permit a judgment against the Surety upon an undertaking given in said section 454 to abide by and perform any judgment in relation to attached property upon the release of the same from the right of attachment without the submission to a jury of any question of fact relating to said property; or if said sections are to be construed as permitting a judgment to be rendered against such a surety for the appraised value of such property, and are valid and constitutional to that extent then, upon a proper construction and application of said provision of the Constitution to this case, the rendition of a judgment herein for the value of said property, without the submission of the question of its value to a jury, would be a violation of said provision of the Constitution in that the record shows that there was no appraisement of the said value.

2. That accordingly the said appeal was a case involving the construction or application of the Constitution of the United States, within the meaning of section 250 of the Judicial Code of the United States, in which class of cases any final judgment or decree of this Court may be re-examined, and affirmed, reversed or modified by the Supreme Court of the United States upon writ of error or appeal.

Wherefore, the premises considered, Your petitioner re-
67 spectfully prays the Court for the allowance of a writ of error whereby the final judgment of this Court in said cause on said appeal may be re-examined and affirmed, reversed or modified.

METROPOLITAN SURETY COMPANY, *A Corporation,*
By ELLIS & DONALDSON,
C. C. TUCKER, &
ABNER FERGUSON,
Its Attorneys.

(Endorsed:) No. 2480. The United Surety Co., Appellant, vs. American Fruit Product Co. Petition for Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed April 16, 1913. Henry W. Hodges, Clerk.

68 No. 2480.

THE UNITED SURETY COMPANY, a Corporation,
v.
AMERICAN FRUIT PRODUCT COMPANY, a Corporation.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

This is an application for a writ of error to the Supreme Court of the United States from the judgment of this court in the above-entitled case, — App. D. C., —, present term. The application is based upon the ground that the constitutionality of sections 454 and 455 of the Code of Laws for the District of Columbia is drawn in question. Section 250, paragraph 3, of the Judiciary Act grants the right of appeal from this court to the Supreme Court of the United States "in cases involving the construction or application of the Constitution of the United States or the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority."

A mere reference to the record and opinion in this case will disclose that the question raised was the constitutionality of a law of the District of Columbia, and not a general law of the United States. The right of appeal is confined to cases in which the constitutionality of general laws of the United States is involved, and not acts of Congress local to the District of Columbia. The application is denied.

69 April Term, 1913.

TUESDAY, May 6th, A. D. 1913.

No. 2480.

THE UNITED SURETY COMPANY, a Corporation, Appellant,
vs.
AMERICAN FRUIT PRODUCT COMPANY, a Corporation.

On consideration of the petition for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, it is by the Court this day ordered that said petition be and the same is hereby denied.

Per MR. JUSTICE VAN ORSDEL,
May 6, 1913.

70 Court of Appeals of the District of Columbia.

No. 2480.

UNITED SURETY COMPANY, a Corporation, Appellant,
vs.
AMERICAN FRUIT PRODUCT COMPANY, a Corporation.

Motion.

Comes now the appellant and moves the court to vacate and set aside its order heretofore made denying the application for a writ of error to remove the cause to the Supreme Court of the United States for review by that court of the decision of this court, and to grant the application for the writ of error; upon the grounds and for the reasons set forth in the accompanying memorandum.

WADE H. ELLIS,
C. C. TUCKER,
R. G. DONALDSON, &
ABNER FERGUSON,
Attorneys for Appellant.

Memorandum.

Counsel for the appellant in this case, before applying to a justice of the Supreme Court of the United States for the allowance of a writ of error, this court having denied the writ, deem it their duty to call the attention of the court to the language of the Supreme Court in the case of the American Security & Trust Company
71 v. Commissioners of the District of Columbia, 224 U. S. 491.

That was an application for a writ of error to this court under paragraph 6 of section 250 of the judicial code which reads as follows:—

"Par. 6. In cases in which the construction of any law of the United States is drawn in question by the defendant."

The court in its opinion said—

"Of course, there is no doubt that the special Act of Congress (referring to the Act of February 6, 1909. for the extension of New York Avenue) was, in one sense a law of the United States. It well may be that it would fall within the meaning of the same words in the third clause of the same section: 'cases involving the constitutionality of any law of the United States.' Parsons v. District of Columbia, 170 U. S. 45. But it needs no authority to show that the same phrase may have different meanings in different connections. Some reasons for strict construction apply here."

It is respectfully submitted that the Supreme Court by this language having so strongly intimated that a distinction exists between the use of the words "any law of the United States" in paragraphs 3 and 6 of section 250 of the judicial code; and that a writ of error should be granted under paragraph 3 in cases involving "the construction of the Constitution of the United States or the constitution-

ality of any law of the United States"; and having supported such intimation by the citation of a previous decision of that court, which does support such intimation; the writ of error in the case at bar should be granted, and the question of whether it was properly granted left to the ultimate determination of that court.

Respectfully submitted,

WADE H. ELLIS,
C. C. TUCKER,
R. G. DONALSON, &
ABNER FERGUSON,
Attorneys for Appellant.

72 (Endorsed:) No. 2480. United Surety Company, a corporation, Appellant, vs. American Fruit Product Company, a corporation. Motion to vacate order denying application for writ of error. Court of Appeals, District of Columbia. Filed May 9, 1913. Henry W. Hodges, Clerk.

73 TUESDAY, May 13th, A. D. 1913.

No. 2480.

THE UNITED SURETY COMPANY, a Corporation, Appellant,
vs.
AMERICAN FRUIT PRODUCT COMPANY, a Corporation.

On consideration of the motion to vacate the order denying a writ of error to remove the above entitled cause to the Supreme Court of the United States, it is by the Court this day ordered that said motion be and the same is hereby overruled.

74 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The United Surety Company, a corporation, appellant, and the American Fruit Product Company, a corporation, appellee, known as Appeal Number 2480 in said Court, a manifest error hath happened, to the great damage of the said The United Surety Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of June, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
EDWARD D. WHITE,
Chief Justice of United States.

[Endorsed:] No. 2480. The United Surety Company, a Corporation, Appellant, vs. American Fruit Product Company, a Corporation. Writ of Error from Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 7, 1913. Henry W. Hodges, Clerk.

75 Know all men by these presents, that we, The United Surety Company, a corporation of the State of Maryland, as principal, and Massachusetts Bonding and Insurance Company, a corporation of the Commonwealth of Massachusetts, as surety, are held and firmy bound unto American Fruit Product Company, a corporation, in the full and just sum of Five Hundred (500) dollars, to be paid to the said American Fruit Product Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 6th day of June, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at an appeal in a suit depending in said Court, between the United Surety Company, a corporation, appellant and American Fruit Product Company, a corporation, appellee, a judgment was rendered against the said the United Surety Company and the said The United Surety Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said American Fruit Product Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The United Surety Company shall prosecute said writ to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE UNITED SURETY COMPANY. [SEAL.]
By R. GOLDEN DONALDSON, [SEAL.]
Its Attorney.

[Seal of Massachusetts Bonding & Insurance Co.]

MASSACHUSETTS BONDING AND INSURANCE COMPANY, [SEAL.]
By LEE B. MOSHER, *Attorney in Fact.*

Sealed and delivered in presence of—
ABNER H. FERGUSON.

Approved by—
EDWARD D. WHITE,
Chief Justice of the United States.

[Endorsed:] No. 2480. The United Surety Company, a Corporation, Appellant, vs. American Fruit Product Company, a Corporation. Bond on Writ of Error from Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 7, 1913. Henry W. Hodges, Clerk.

76 UNITED STATES OF AMERICA, *ss:*

To American Fruit Product Company, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United Surety Company, a corporation is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 6th day of June, in the year of our Lord one thousand nine hundred and thirteen.

EDWARD D. WHITE,
Chief Justice of the United States.

Service of a copy hereof accepted this 6th day of June, 1913.
HAMILTON, YERKES & HAMILTON,
Att'ys for American Fruit Product Co.

[Endorsed:] No. 2480. Court of Appeals, District of Columbia. Filed Jun- 7, 1913. Henry W. Hodges, Clerk.

77 *Assignments of Error.*

The United Surety Company of Baltimore, Maryland, assigns errors to the rulings, holdings and action of the Court herein as follows:

1. The Court erred in overruling the objection of the United Surety Company to the swearing and impaneling of the jury upon the following grounds:

(*a*) The issue joined between the plaintiff and the defendant had already been determined by a jury impaneled and judgment rendered on verdict in favor of the plaintiff, which judgment remained of record unreversed and having full force and effect. There was

no authority in law, therefore, for the impaneling of another jury and swearing them to retry the same issue.

(*b*) If the record in this case showed that the property of the defendant sought to be seized under the writ of attachment issued herein was appraised by the marshal (which is denied) the only judgment that could have been legally entered against the United Surety Company, surety on the undertaking given, was for such appraised value. If the record did not show that said property was so appraised there was no authority under the statute for a subsequent appraisal or a valuation of said property to be made by the Court or by a jury to be sworn in the cause.

(*c*) There was of record in this cause when it was sought to impanel a second jury, an existing judgment against the defendant and there was no statutory or other authority and no jurisdiction in the Court so far as the United Surety Company was concerned, to make a reinquiry in to the rights of the plaintiff as against the United Surety Company, whatever may be the rights of the
78 plaintiff upon the undertaking signed by said United Surety Company, as a common law undertaking.

(*d*) The plaintiff having elected to take a personal judgment against the defendant for the amount of its claim and having issued execution thereon, thus recognizing it as a valid judgment, and having elected to have that judgment remain of record after the expiration of the term at which it was rendered and after it was vacated as to the United Surety Company, thereby abandoned and waived its right to a judgment against the United Surety Company upon the undertaking given by it, whereby it undertook to pay any judgment which might be rendered in relation to the attached property.

(*e*) Section- 454 and 455 of the Code of law for the District of Columbia are unconstitutional and void in so far as they permit the entry of a judgment against the surety on an undertaking given thereunder, without permitting him his day in court and deprive him of the due process of law to which he is entitled under the Constitution of the United States.

(*f*) Under a proper construction and application of that provision of the Constitution of the United States declaring that no person shall be deprived of his property without due process of law, Sections 454 and 455 of the Code of Law for the District of Columbia, in so far as they permit a summary judgment to be entered against a surety on a release undertaking in attachment, who has submitted himself to the jurisdiction of the Court and promised to pay any judgment of the Court in the premises in relation
79 to the property attached, without provision for an inquiry as to the value of the property released, at which such surety shall have an opportunity to appear and be heard, are unconstitutional and void.

2. The Court erred in ruling and holding that the order of October 21, 1910 (the order of Mr. Justice Barnard setting aside as to the United Surety Company the verdict of May 29th, 1910, and the judgment of May 25th, 1910) operated in law to set aside the verdict and judgment as to the principal as well, and in ordering trial to proceed de novo:

(*a*) Because the said ruling and order were made and passed without notice to the said principal or to the United Surety Company and without an opportunity for the said principal to defend said action or object to said ruling and order.

(*b*) Because the Court was without authority or jurisdiction to set aside or disturb the said judgment of May 25th, 1910, as to the principal after the term at which said judgment was entered and enrolled had passed.

3. The Court erred in overruling the objection of the United Surety Company to the testimony offered by the plaintiff tending to show that it had sold and delivered to the defendant the goods described in the declaration and that there was due it from the defendant the sum of $9,937.20, upon the following grounds:

(*a*) Because the amount of said indebtedness had theretofore been found and determined by the verdict of a jury in this cause to have been $8,748.29 and a judgment rendered on said verdict at a term which had expired.

80 (*b*) Because said evidence was offered and received without notice to the Semmes-Kelly Company and without an opportunity for said Semmes-Kelly Company to rebut the same.

(*c*) Because the said evidence was inadmissible as against the United Surety Company in that no valid judgment could be entered against said company, under the statute, except a judgment in relation to the property attached and for the appraised value thereof.

4. The court erred in allowing the witness Cusick to testify, over the objection of the United Surety Company, as to what was done in the execution or levy of the writ of attachment issued in the case for the following reasons:

(*a*) The statute does not provide for inquiry by the jury into the circumstances under which a writ of attachment is levied.

(*b*) That the testimony of the witness as to what was done in levying the attachment or following the levy of the attachment tends to impeach and contradict the record in the case.

(*c*) There is no statutory authority for the trial of any issue as to the circumstances under which the levy was made by the jury sworn to try the issue joined between the plaintiff and the defendant, the Semmes-Kelly Company, in this case, and no authority to try any issue between the plaintiff and the United Surety Company especially when, as was the case here, no such issue had been made up, and no provision is made by law for such an issue to be made up.

5. The Court erred in allowing the witness Cusick to testify, over the objection of the United Surety Company, to the con-
81 versations had by him with Mr. Charles W. Semmes, the President of the Semmes-Kelly Company, and with the United States Marshal's office, on the ground that the alleged conversations having transpired in the absence of the United Surety Company, or any of its representatives, the testimony was not binding in any way upon the United Surety Company, nor admissible against it.

6. The Court erred in overruling the motion of the United

Surety Company to strike out the testimony of the witness Frederick Cusick that Mr. Semmes said to him that the value of the stock of goods of the Semmes-Kelly Company was in excess of $20,000 because there was no statutory provision for an inquiry by the Court or jury as to the value of the property attached, and also because the testimony was hearsay.

7. The Court erred in refusing to grant the first prayer offered by the United Surety Company directing the jury to return a verdict for the United Surety Company at the close of all the testimony upon the grounds stated in assignment numbered 1 above, and, in addition thereto;

(*a*) Because there was no testimony tending to show any appraisement of the property attached and released by the undertaking given to release said property.

(*b*) Because even if it were permissible for the court or jury to find the value of the property attached (which is denied) in order that the liability of the United Surety Company upon the undertaking given by it, might be thereby fixed, there was no evidence tending to show the value of said property.

82 (*c*) Because under the evidence the jury could only find the amount due from the Semmes-Kelly Company to the plaintiff, and there was nothing in the record or in the testimony on which the jury could have found a verdict or the Court could have entered a judgment in relation to the property attached, while under the statute authorizing said undertaking the said United Surety Company could only be liable for the judgment in relation to the said property.

(*d*) Because if sections 454 to 456, both inclusive, of the Code of Laws of the District of Columbia, should be construed so as to permit of a judgment against the United Surety Company, without an appraisement of the property attached, or a finding of its value by the jury, then the said sections are unconstitutional and void in that they deprive the said surety of its property without due process of law.

8. The Court erred in overruling the motion of the United Surety Company for the arrest of the judgment for the following reasons:

(*a*) That, as the record shows there was no appraisement of the value of the defendant's property at the time of or after the issue of the writ of attachment herein, the court has no jurisdiction to enter a judgment against the surety on the undertaking given by the United Surety Company.

(*b*) That even if it were permissible for the jury to find by the verdict the value of the property of the defendant before or after the issue of the writ of attachment herein in order that the lia-

83 bility of the United Surety Company upon the undertaking given by it might be thereby fixed (which is denied) as said value was not fixed by the verdict found by the jury, the court was, therefore, without jurisdiction to enter a judgment on said verdict against said company.

(*c*) That as the liability of the said United Surety Company upon

the undertaking given by it was limited by the terms thereof, to abiding by and performing any judgment which should be rendered in relation to the attached property, and as the verdict of the jury merely found the amount due from the defendant to the plaintiff, without any finding in relation to said property, the court had no jurisdiction to enter any judgment on said verdict against said United Surety Company.

(*d*) That section 454 to 456, both inclusive, of the Code of Laws for the District of Columbia are unconstitutional and void under that provision of the Constitution of the United States, which declares that no person shall be deprived of his property, without due process of law, in so far as they attempt to permit or do permit a judgment against the Surety upon an undertaking given in said section 454 to abide by and perform any judgment in relation to attached property upon the release of the same from the attachment without the submission to a jury of any question of fact relating to said property; or if said sections are to be construed as permitting a judgment to be rendered against such a surety for the appraised value of such property, and are valid and constitutional to that extent then, upon a proper construction and application of said provision of the Constitution to this case, the rendition of a judg-
83½ ment herein for the value of said property, without the submission of the question of its value to a jury, would be a violation of said provision of the Constitution in that the record shows that there was no appraisement of the said value.

9. The Court of Appeals erred in holding and ruling that "the value of the property is conceded to be far in excess of the judgment", there being nothing in the record to show that any such concession was made.

10. The Court erred in other respects apparent of record.

WADE H. ELLIS,
R. GOLDEN DONALDSON,
CHARLES COWLES TUCKER,
ABNER H. FERGUSON,
Attorneys for the United Surety Co.

(Endorsed:) No. 2480. United Surety Company vs. American Fruit Product Company. Assignments of Error. Court of Appeals, District of Columbia. Filed Jun- 18, 1913. Henry W. Hodges, Clerk.

84 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 83 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United Surety Company, a Corporation, appellant, vs. American Fruit Product Company, a corporation, No. 2480, April Term, 1913, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 18th day of June A. D. 1913.

[Seal Court of Appeals, District of Columbia. 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 23,760. District of Columbia Court of Appeals. Term No. 203. The United Surety Company, plaintiff in error, vs. American Fruit Product Company. Filed June 20th, 1913. File No. 23,760.

GENERAL INDEX.

	Page
Argument	21
1. Ruling on effect of vacation of judgment	21
2. Appraisement	29
3. Effect of taking personal judgment	47
4. Objections to testimony	52
5. Constitutional questions	53
Assignment of Errors	15
Provisions of Code, D. C.	30, 31
Statement of Facts	1

List of Cases Cited.

Ash vs. McCabe, 21 Ohio State, 181	29
Bailey vs. McGinness, 57 Mo., 362	29
Beall vs. New Mexico, 16 Wall., 535	57
Boyd vs. Ellis, 107 Mo., 394	29
Capital City Dairy Co. vs. Plummer, 20 Ind. App., 409	48, 49
Cheek vs. Pugh, 19 Ark., 574	28
Council Bluffs Savings Bank vs. Griswold, 50 Neb., 754	29
Drake on Attachments, Sec. 242	44
Faulkner vs. Cook, 103 S. W., 384	39, 41, 42
Freeman on Judgments, Sec. 136	25
Gass vs. Williams, 46 Ind., 253	48, 50
Gilbert vs. Gilbert, 33 Mo. App., 259	48
Hall vs. Williams, 6 Pick., 232	24
Hall vs. Walbridge, 2 Aik. (Vt.), 215	48
Hardcastle vs. Hickman, 26 Mo., 475	50
Holten vs. Towner, 81 Mo., 360	29
Jameson vs. Pomeroy, 9 Pa. St., 230	29
Karrick vs. Wetmore, 25 App. D. C., 415; 205 U. S., 141	23
Kitchens vs. Hutchins, 44 Ga., 260	27
Lowenstein vs. McCadden, 54 Ark., 13	41, 44
Lowry vs. McGee, 75 Ind., 508	48
Mercer vs. James, 6 Neb., 406	26

	Page
Moore Co. vs. Billings, 46 Ore., 401	48
Murphy vs. Orr, 32 Ill., 489	29
Neenan vs. St. Joseph, 126 Mo.	27
Newburg vs. Munshower, 29 Ohio St., 617	29
North vs. Mudge, 13 Iowa, 496	29
Phillips vs. Harvey, 50 Miss., 489	41, 44
Phillips vs. Negley, 117 U. S., 665	23
Ray vs. Stewart, 33 Gratt., 351	29
Richard vs. Mooney, 39 Miss., 357	41, 43
Sannes vs. Ross, 105 Ind., 558	48, 50
Schieb vs. Baldwin, 22 Hon. Pr., 278	48
Shallcross vs. Smith, 81 Pa. St., 132	29
Smith vs. Scott, 86 Ind., 346	48, 50
St. John vs. Holmes, 20 Wend., 609	29
Staunton vs. Harris, 56 Tenn., 578	48
Tenny vs. Taylor, 1 App. D. C., 223	53
Turner vs. Collier, 37 Ark., 532	39, 41
Urbanski vs. Manns, 87 Ind., 585	50, 51
U. S. Mortgage Co. vs. Henderson, 111 Ind., 24	48, 49
Wright vs. Manns, 111 Ind., 422	39, 50, 51
York Bank's Appeal, 36 Pa. St., 458	26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 203.

THE UNITED SURETY COMPANY, A CORPORATION,
Plaintiff in Error,

vs.

AMERICAN FRUIT PRODUCT COMPANY, A CORPORATION,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This is a writ of error granted on the application of the surety on an attachment undertaking given to secure the release of attached property, to review an order of the Supreme Court of the District of Columbia overruling a motion in arrest of judgment and a judgment on verdict against the principal on the undertaking, and the surety for $9,937.20.

The action was brought in said court on April 22, 1908, by the appellee, the American Fruit Product Company against the Semmes-Kelly Company, a corporation, doing business in the City of Washington, upon an open account, to recover a balance of $10,596.45. The declaration was supported by affidavits, and a writ of attachment was issued upon the ground of the non-residence of the defendant, the Semmes-Kelly Company, that company being a Virginia corporation. The marshal's return was "attached as per schedule herewith and served defendant with a copy of this writ and notice prescribed by section 446 of the Code. April 22, 1908." On the return was entered "Released on bond April 23, 1908," and attached to the return was a paper marked "Schedule of levy under writ of attachment." On this so-called schedule were written the words, "Large stock of merchandise, groceries, canned goods, etc., located at store—premises No. 614-616 Penn. Ave.—valued at $20,000." Attached to the so-called schedule was a printed blank form apparently intended to be filled in by appraisers of the property, but which was not filled in or signed by any one. It read:

> "We, the undersigned, citizens of the District of Columbia, having been duly summoned and sworn by the Marshal of said District, do hereby certify that we have appraised the property described in the foregoing schedule at ——— dollars.
>
> Given under our hands and seals, this —— day of ——, 190—.
>
> —— —— (Seal).
> —— —— (Seal)."

On April 23, 1908, there was filed an undertaking to release the property attached, bearing the signatures of the defendant the Semmes-Kelly Company, and of the plaintiff in error, The United Surety Company, as surety, it having

been signed for the plaintiff in error by Oscar J. Ricketts, its agent, and R. Golden Donaldson, its attorney in fact (R. 6). By this undertaking the principal and surety, submitting to the jurisdiction of the court, undertook to abide by and perform the judgment of the court in the premises in relation to the property levied upon, and agreed that such judgment might be rendered against both the principal and surety. The undertaking was dated April 23, 1908.

Thereafter pleas were filed by the defendant to the declaration (R. 7-12), and the plaintiff joined issue on the pleas (R. 14).

On May 19, 1910, a jury was empanelled to try the issue joined between the plaintiff and the defendant, and there was a verdict in favor of the plaintiff for $8,748.29 with interest from November 9, 1907 (R. 14).

On May 25, 1910, judgment was entered on the verdict, which judgment read that the plaintiff "recover of the defendant herein and the United Surety Company of Baltimore, Maryland, its surety, the sum of $20,000 appraised value of the property herein attached and upon payment by said defendant and its surety, to said plaintiff of the sum of $8,748.29, together with interest thereon from the 9th day of November, 1907, as aforesaid, found due by said defendant to said plaintiff by reason of the premises, and costs of suit, for which execution shall be had, it is ordered that the undertaking filed herein April 23, 1908, be "discharged and released" (R. 15).

On August 16, 1910, the plaintiff caused a fi. fa. to be issued on the judgment and the same was returned *"nulla bona."*

On August 30, 1910, the plaintiff caused an attachment on judgment to be issued and the same was returned the same day "attached credits in the hands of Oscar J. Ricketts—Edward B. Eynon, Jr., August 31, 1910" (R. 15).

On September 7, 1910, the surety on the undertaking, the plaintiff in error, moved the court to stay the execution upon and vacate the judgment entered against it on May 25, 1910, on various grounds set forth in the motion (R. 15-16), and supported the motion by numerous affidavits (R. 16-19).

The plaintiff filed counter-affidavits (R. 20-25). On September 7, 1910, on motion of the plaintiff in error, the surety, the court ordered that the garnishment and execution on the judgment be stayed until further order of the court.

On October 21, 1910, the court in an opinion to be found in the Record at pages 26, 27 and 28, granted the motion of the plaintiff in error to vacate the judgment, as to it, unless the plaintiff should within ten days enter a remittitur as to all its judgment and interest in excess of $4,842.15 with interest thereon from February 1, 1908, and costs.

On the same day, an order was entered which read:

> "that the verdict rendered herein May 19, 1910, and the judgment thereon, entered May 25, 1910, be and they are hereby set aside, vacated and for nothing held as against said United Surety Company, unless the plaintiff shall within ten days hereof file herein a remittitur to all of its said judgment and interest in excess of $4,842.15, with interest thereon from February 1, 1908, and costs—whereupon, the plaintiff by its attorneys of record, in open court, declining to file such remittitur, said verdict and judgment are hereby set aside, vacated and for nothing held at to said United Surety Company" (R. 29.)

This order also directed that the cause be restored to the trial calendar.

On May 26, 1912, the cause was called for trial, having been reached on the trial calendar. The plaintiff in error,

the surety company, thereupon objected to the empanelling and swearing of the jury upon the following grounds:

1. The issue joined on the pleadings between the plaintiff and the defendant has already been determined by a jury heretofore impanelled, and judgment rendered on such verdict in favor of the plaintiff, which judgment remains of record unreversed and having full force and effect. There is no authority in law, therefore, for the impanelling of another jury and swearing them to retry the same issue.

2. There is no authority in law, and no jurisdiction in the court, to impanel and swear a jury in this case to try an issue joined between the plaintiff and the United Surety Company, because the record of the cause does not show that any issue has ever been joined or made between the plaintiff and said United Surety Company.

3. If the record in this case shows that the property of the defendant sought to be seized under the writ of attachment issued herein, was appraised by the Marshal (which is denied), the only judgment that could have been legally entered against the United Surety Company, surety on the undertaking given, was for such appraised value. If the record does not show that said property was so appraised, there is no authority in law for such appraisal now to be made, or a valuation of said property now to be made, by a jury to be sworn in the cause.

4. There is now of record in this cause an existing judgment against the defendant and there is no statutory or other authority and no jurisdiction in the court to enter judgment herein, so far as the United Surety Company is concerned, whatever may be the rights of the plaintiff upon the undertaking signed by said United Surety Company, as a common law undertaking.

5. The plaintiff having elected to take a personal judgment against the defendant for the amount of its claim,

and having elected to have that judgment remain of record after the expiration of the term at which it was rendered, and after it was vacated as to the United Surety Company, has abandoned and waived its right to a judgment against the United Surety Company upon the undertaking given by it, whereby it undertook to pay any judgment which might be rendered in relation to the attached property.

6. Secs. 454 and 455 of the Code of Law for the District of Columbia are unconstitutional and void in so far as they permit the entry of a judgment against the surety on an undertaking given thereunder, without permitting him his day in court, and deprive him of due process of law to which he is entitled under the Constitution of the United States.

7. Under a proper construction and application of that provision of the Constitution of the United States declaring that no person shall be deprived of his property without due process of law, Secs. 454 and 455, of the Code of Law for the District of Columbia, in so far as they permit a summary judgment to be entered against a surety on a release undertaking in attachment, who has submitted himself to the jurisdiction of the court and promised to pay any judgment of the court in the premises in relation to the property attached, without provision for an inquiry as to value of the property released, at which such surety shall have an opportunity to appear and be heard—are unconstitutional and void.

8. This court has no power or jurisdiction to proceed further in this cause so far as the United Surety Company is concerned, having exhausted such power and jurisdiction by the entry of the judgment heretofore rendered and the vacation of such judgment as to said Company.

The court overruled the objection, noted the exception of the plaintiff in error to its action in so doing, and imme-

diately and without notice to the defendant, or the plaintiff in error, caused to be entered on the minutes the following ruling:

> "It is by the court ruled and held that the order of October 21, 1910, setting aside the verdict of May 19, 1910, and judgment of May 25, 1910, as to said United Surety Company of Baltimore, Md., operates in law to set aside the verdict and judgment as to principal as well, and that the trial shall proceed *de novo*." (R. 31.)

To this ruling, the plaintiff in error objected on the ground that it was an attempt to vacate a judgment without notice, and on the further ground that the court was without power or jurisdiction to modify or alter in any way an existing judgment which had been enrolled, the term having expired at which said judgment was rendered (R. 37). The objection was overruled and the plaintiff in error reserved an exception.

Thereupon, although as the Bill of Exceptions shows (R. 35), there was no appearance for the defendant in the action, a jury was impanelled, was sworn to try the issues joined between the plaintiff and defendant and the court proceeded with the trial.

The plaintiff placed on the stand witnesses to establish its claim against the defendant and the plaintiff in error objected to their testimony on the ground that the claim had already been reduced to judgment and on the further ground that as there was no appearance in the action on behalf of the defendant, it was improper and incompetent to make any inquiry into the state of the claim. The court overruled the objection and the plaintiff in error noted an exception (R. 37).

The plaintiff produced as a witness one Cusick, a deputy marshal, who testified that on April 22, 1908, he had occa-

sion to execute an attachment in a suit against the defendant. Asked what he had done, the plaintiff in error objected on the ground that the statute does not provide for an inquiry by the jury into the circumstances of the issue of a writ of attachment, that is, in the trial of the action between the plaintiff and the defendant, and that, therefore, all evidence that related to what was done in levying the attachment, or following the levying of the attachment, was inadmissible and incompetent; and further, that there was no statutory provision for any trial of any issue by the jury which was sworn to try the issue between the plaintiff and the defendant, and no issue had been made up between the plaintiff and the plaintiff in error, and no provision was made by law for such an issue to be made up (R. 37-38). The court overruled the objection and the plaintiff in error noted an exception. The court said that at the time he was not sure that the evidence was for the consideration of the jury at all. The witness then in substance testified that he had gone to the store of the defendant, and related what he did there, over the objection of the plaintiff in error, which was to the effect that the witness had no right to testify to anything that transpired in the absence of the plaintiff in error or any of its representatives. The objection was overruled and an exception by the plaintiff in error was noted (R. 38). Witness testified that while at the store he was called up by Mr. Robison, chief deputy marshal, who asked how long it would take to make an appraisement of the stock of goods in the store, and witness replied at least two or three days. Thereupon Mr. Robison told him not to have the appraisement made, but told witness to see Mr. Semmes, the president of the defendant corporation, and ask him if he had $20,000 worth of stock on hand. Witness did so and Mr. Semmes said, "Yes, I think a great deal more." The appellant moved to strike out all the testimony of the

witness as to what Mr. Semmes told him in relation to the value of the stock as being in no wise binding upon plaintiff in error. The court overruled the objection and the plaintiff in error noted an exception. The witness further stated that he remained in possession of the stock pretty much all the afternoon and until he was called off in the evening by Mr. Robison (R. 39).

Mr. Robison, called as a witness by the plaintiff, testified that he had been told by defendant's counsel that a writ of attachment was probably to be issued and that if it did come, there was no occasion to levy it, as a forthcoming bond would be given; that when the writ came, it was placed in the hands of Cusick; that he, Cusick, went down there and appraisers were summoned; that the goods were not appraised, but that on the schedule, he, Robison, wrote in $20,000 from information that was given him either by Mr. Douglas, the attorney for the defendant, or by Mr. Semmes; that the witness never saw the goods himself and was not on hand, but that the writing in the schedule was his handwriting. After stating at first that he thought that when the forthcoming bond was given there was present besides Mr. Colbert, the attorney for the plaintiff, Mr. Ricketts and Mr. Donaldson, the agent and attorney for the plaintiff in error (R. 39), and after Mr. Donaldson and Mr. Ricketts both had testified that they had not gone near the Court House at the time of the signing of the undertaking, but had signed the same in their private offices, the witness said: "I did not testify I had any understanding with Mr. Donaldson or Mr. Ricketts about there being $20,000 worth of property there. I do not testify that they were concerned in the information which came to me about there being $20,000 worth of property there. That, I take it, came from Mr. Semmes, who told Mr. Cusick—the very Mr. Cusick who was down there representing the office and

inspected the entire property and all the goods, and from the general situation that was the conclusion" (R. 47-48). He further said, "Those gentlemen" (meaning Mr. Donaldson and Mr. Ricketts) "having testified to that I would not be sure—I would not say they were present, but the bond was there" (R. 48). The court then asked the witness, "If I understand you now, Mr. Robison, you do not say that any representative of the surety company was present and waived the matter of an appraisement?" The witness replied, "No, sir, I do not" (R. 48).

At the close of the plaintiff's testimony, the plaintiff in error, the surety company, moved the court to direct a verdict in its favor upon substantially the same grounds as set forth in the objection to the impanelling of the jury (R. 42-43). The court overruled the motion and the plaintiff in error reserved an exception.

Several witnesses were sworn on behalf of the plaintiff in error.

Mr. Ricketts, the agent of the company, testified that he had signed the undertaking for the plaintiff in error in his office, 1325 F street, N. W., upon the application of counsel for the defendant, the Semmes-Kelly Company. He said that he had never agreed with anybody that there should not be an appraisement of the property and was never present when any agreement with respect to the property not being appraised was made, if there was such an agreement (R. 43). He said Mr. Semmes, the president of the defendant company, had told him that he did not believe there was any risk on the bond because the action was not well-founded and the assets of the company were far in excess of the amount attached. He said he knew nothing about any conversation being held in the Court House between any representative of his company and of representatives of the defendant and the plaintiff to the cause; and at the

time he had no one at the Court House soliciting bonds for the company (R. 46).

Mr. Donaldson testified that he was attorney for the company, and the attorney in fact to countersign bonds in the absence of either Mr. Ricketts or Mr. Eynon; that he signed the undertaking in his office at 611 14th street, N. W., it having been brought to him by Mr. Ricketts; that he was not at any time at the Court House in connection with the signing of the undertaking and never made any agreement with anybody as to the valuation of the property seized under the writ of attachment mentioned in the undertaking; that he knew nothing about the value of the property.

Mr. Semmes testified (R. 49), that Mr. Ricketts had signed the undertaking in his, Mr. Ricketts' office and witness did not see it after that time; that no arrangement was made with Mr. Ricketts nor any understanding had with him as to whether or not there should be an appraisement of the property; that witness had no understanding or agreement with anybody connected with the United Surety Company whereby it was agreed that no appraisement of the property should be made.

On cross-examination, the witness testified that the stock of goods of his company was at the time of the attachment more than $20,000.

The plaintiff in error also gave evidence tending to support the plea of set-off of the defendant in the cause in the sum of $4,310.12 (R. 50).

At the close of all of the testimony, the plaintiff in error moved the court to instruct the jury that upon the whole evidence they return a verdict for it, and also moved that the jury should be instructed that upon the whole evidence they should return a verdict for the defendant. These motions were denied and exceptions were noted (R. 51).

The court charged the jury and the jury returned a verdict which is recited in the record as follows:

> "They find the issue herein joined in favor of the plaintiff, and assess its damages by reason of the premises at $9,937.20" (R. 31).

The plaintiff in error moved (R. 31-32) to arrest the judgment on the following grounds:

1. That, as the record shows there was no appraisement of the value of the defendant's property at or after the issue of the writ of attachment herein, the court has no jurisdiction to enter a judgment against the surety on the undertaking given by the United Surety Company.

2. That, even if it were permissible for the jury to find by this verdict the value of the property of the defendant before or after the issue of the writ of attachment herein, in order that the liability of the United Surety Company upon the undertaking given by it might be thereby fixed (which is denied) as said value was not fixed by the verdict found by the jury, the court is therefore without jurisdiction to enter a judgment on said verdict against said company.

3. That as the liability of the said United Surety Company upon the undertaking given by it is limited by the terms thereof, to abiding by and performing any judgment which may be rendered in relation to the attached property, and as the verdict of the jury merely found the amount due from the defendant to the plaintiff, without any finding in relation to said property, the court has no jurisdiction to enter any judgment on said verdict against said United Surety Company.

4. That Sections 454 to 456, both inclusive, of the Code of Laws for the District of Columbia are unconstitutional

and void, under that provision of the Constitution of the United States, which declares that no person shall be deprived of his property, without due process of law, in so far as they attempt to permit or do permit a judgment against the surety upon an undertaking given under said Section 454 to abide by and perform any judgment in relation to attached property upon the release of the same from the writ of attachment, without the submission to a jury of any question of fact relating to said property; or if said sections are to be construed as permitting a judgement to be rendered against such a surety for the appraised value of such property, and are valid and constitutional to that extent then, upon a proper construction and application of said provision of the Constitution to this case, the rendition of a judgment herein for the value of said property, without the submission of the question of its value to a jury, would be a violation of said provision of the Constitution, in that the record shows that there was no appraisement of the said value.

The motion was overruled and judgment entered (R. 33), which judgment after the recital of various steps that had been taken in the cause up to that time and that no appraisers had been appointed, further recited:

> "It appears to the Court from the uncontradicted testimony of Charles W. Semmes, president of the defendant company, who signed the application to said Surety Company for said bond, and who executed and delivered to said Surety Company an indemnifying bond in this matter, that the stock of goods levied upon and attached by the marshal was worth more than $20,000 at the time of the levy, and this court having offered to permit said Surety Company to introduce other evidence as to the value of the stock of goods so levied upon by the marshal if it so desired, or, if so advised, to submit the question of the value of

the goods levied upon to a jury to be summoned and selected for that purpose, and said Surety Company having declined to take advantage of either of said offers, the Court is of the opinion and so finds, that under the evidence, submitted, including the record in this case, the plaintiff has established its right to a joint judgment in this action against the defendant and the United Surety Company, and therefore, it is now ordered and adjudged that the plaintiff, American Fruit Product Company, a corporation, recover of the defendant, Semmes-Kelly Company, a corporation, and the United Surety Company, a corporation, the sum of $9,937.20 found due by the said defendant to the said plaintiff by the verdict of the jury duly rendered herein and the costs of this suit and interest on said amount of $9,937.20 from this day until paid, at the rate of 6 per cent per annum, and for which execution shall be had, and may be issued, but this judgment to be released and held for naught as to said United Surety Company upon the delivery by it or by the defendant to the United States Marshal of this District of the property levied upon, if said delivery be made within ten days from the date of the entry of this judgment; otherwise to be and remain in full force and effect" (R. 34).

The plaintiff in error noted an exception to the entry of this judgment and also entered an appeal therefrom to the Court of Appeals of the District of Columbia which court, in an opinion to be found on pages 60 to 63 of the record, affirmed the judgment of the Supreme Court of the District of Columbia.

A petition for a writ of error to this court was filed in the Court of Appeals and was denied, whereupon application for said writ was made to this court and was on the 6th day of June, 1913, allowed.

ASSIGNMENTS OF ERROR.

The United Surety Company of Baltimore, Maryland, assigns errors to the rulings, holdings and action of the Court herein as follows:

1. The Court erred in overruling the objection of the United Surety Company to the swearing and impaneling of the jury upon the following grounds:

(*a*) The issue joined between the plaintiff and the defendant had already been determined by a jury impaneled and judgment rendered on verdict in favor of the plaintiff, which judgment remained of record unreversed and having full force and effect. There was no authority in law, therefore, for the impaneling of another jury and swearing them to retry the same issue.

(*b*) If the record in this case showed that the property of the defendant sought to be seized under the writ of attachment issued herein was appraised by the marshal (which is denied) the only judgment that could have been legally entered against the United Surety Company, surety on the undertaking given, was for such appraised value. If the record did not show that said property was so appraised there was no authority under the statute for a subsequent appraisal or a valuation of said property to be made by the Court or by a jury to be sworn in the cause.

(*c*) There was of record in this cause when it was sought to impanel a second jury, an existing judgment against the defendant and there was no statutory or other authority and no jurisdiction in the Court so far as the United Surety Company was concerned, to make a reinquiry into the rights of the plaintiff as against the United Surety Company, whatever may be the rights of the plaintiff upon the undertaking signed by said United Surety Company, as a common law undertaking.

(*d*) The plaintiff having elected to take a personal judgment against the defendant for the amount of its claim and having issued execution thereon, thus recognizing it as a valid judgment, and having elected to have that judgment remain of record after the expiration of the term at which it was rendered and after it was vacated as to the United Surety Company, thereby abandoned and waived its right to a judgment against the United Surety Company upon the undertaking given by it, whereby it undertook to pay any judgment which might be rendered in relation to the attached property.

(*e*) Sections 454 and 455 of the Code of Law for the District of Columbia are unconstitutional and void in so far as they permit the entry of a judgment against the surety on an undertaking given thereunder, without permitting him his day in court and deprive him of the due process of law to which he is entitled under the Constitution of the United States.

(*f*) Under a proper construction and application of that provision of the Constitution of the United States declaring that no person shall be deprived of his property without due process of law, Sections 454 and 455 of the Code of Law for the District of Columbia, in so far as they permit a summary judgment to be entered against a surety on a release undertaking in attachment, who has submitted himself to the jurisdiction of the Court and promised to pay any judgment of the Court in the premises in relation to the property attached, without provision for an inquiry as to the value of the property released, at which such surety shall have an opportunity to appear and be heard, are unconstitutional and void.

2. The Court erred in ruling and holding that the order of October 21, 1910 (the order of Mr. Justice Barnard setting aside as to the United Surety Company the verdict

of May 19, 1910, and the judgment of May 25, 1910) operated in law to set aside the verdict and judgment as to the principal as well, and in ordering trial to proceed *de novo:*

(*a*) Because the said ruling and order were made and passed without notice to the said principal or to the United Surety Company and without an opportunity for the said principal to defend said action or object to said ruling and order.

(*b*) Because the Court was without authority or jurisdiction to set aside or disturb the said judgment of May 25, 1910, as to the principal after the term at which said judgment was entered and enrolled had passed.

3. The Court erred in overruling the objection of the United Surety Company to the testimony offered by the plaintiff tending to show that it had sold and delivered to the defendant the goods described in the declaration and that there was due it from the defendant the sum of $9,937.20, upon the following grounds:

(*a*) Because the amount of said indebtedness had theretofore been found and determined by the verdict of a jury in this cause to have been $8,748.29 and a judgment rendered on said verdict at a term which had expired.

(*b*) Because said evidence was offered and received without notice to the Semmes-Kelly Company and without an opportunity for said Semmes-Kelly Company to rebut the same.

(*c*) Because the said evidence was inadmissible as against the United Surety Company in that no valid judgment could be entered against said company, under the statute, except a judgment in relation to the property attached and for the appraised value thereof.

4. The court erred in allowing the witness Cusick to testify, over the objection of the United Surety Company, as

to what was done in the execution or levy of the writ of attachment issued in the case for the following reasons:

(*a*) The statute does not provide for inquiry by the jury into the circumstances under which a writ of attachment is levied.

(*b*) That the testimony of the witness as to what was done in levying the attachment or following the levy of the attachment tends to impeach and contradict the record in the case.

(*c*) There is no statutory authority for the trial of any issue as to the circumstances under which the levy was made by the jury sworn to try the issue joined between the plaintiff and the defendant, the Semmes-Kelly Company, in this case, and no authority to try any issue between the plaintiff and the United Surety Company especially when, as was the case here, no such issue had been made up, and no provision is made by law for such an issue to be made up.

5. The Court erred in allowing the witness Cusick to testify, over the objection of the United Surety Company, to the conversations had by him with Mr. Charles W. Semmes, the President of the Semmes-Kelly Company, and with the United States Marshal's office, on the ground that the alleged conversations having transpired in the absence of the United Surety Company, or any of its representatives, the testimony was not binding in any way upon the United Surety Company, nor admissible against it.

6. The Court erred in overruling the motion of the United Surety Company to strike out the testimony of the witness Frederick Cusick that Mr. Semmes said to him that the value of the stock of goods of the Semmes-Kelly Company was in excess of $20,000 because there was no statutory provision for an inquiry by the Court or jury as to the value of the property attached, and also because the testimony was hearsay.

7. The Court erred in refusing to grant the first prayer offered by the United Surety Company directing the jury to return a verdict for the United Surety Company at the close of all the testimony upon the grounds stated in assignment numbered 1 above, and, in addition thereto:

(*a*) Because there was no testimony tending to show any appraisement of the property attached and released by the undertaking given to release said property.

(*b*) Because even if it were permissible for the court or jury to find the value of the property attached (which is denied) in order that the liability of the United Surety Company upon the undertaking given by it, might be thereby fixed, there was no evidence tending to show the value of said property.

(*c*) Because under the evidence the jury could only find the amount due from the Semmes-Kelly Company to the plaintiff, and there was nothing in the record or in the testimony on which the jury could have found a verdict or the Court could have entered a judgment in relation to the property attached, while under the statute authorizing said undertaking the said United Surety Company could only be liable for the judgment in relation to the said property.

(*d*) Because if Sections 454 to 456, both inclusive, of the Code of Laws of the District of Columbia, should be construed so as to permit of a judgment against the United Surety Company, without an appraisement of the property attached, or a finding of its value by the jury, then the said sections are unconstitutional and void in that they deprive the said surety of its property without due process of law.

8. The Court erred in overruling the motion of the United Surety Company for the arrest of the judgment for the following reasons:

(*a*) That, as the record shows, there was no appraisement of the value of the defendant's property at the time of

or after the issue of the writ of attachment herein, the Court had no jurisdiction to enter a judgment against the surety on the undertaking given by the United Surety Company.

(*b*) That even if it were permissible for the jury to find by the verdict the value of the property of the defendant before or after the issue of the writ of attachment herein in order that the liability of the United Surety Company upon the undertaking given by it might be thereby fixed (which is denied) as said value was not fixed by the verdict found by the jury, the court was, therefore, without jurisdiction to enter a judgment on said verdict against said company.

(*c*) That as the liability of the said United Surety Company upon the undertaking given by it was limited by the terms thereof, to abiding by and performing any judgment which should be rendered in relation to the attached property, and as the verdict of the jury merely found the amount due from the defendant to the plaintiff, without any finding in relation to said property, the Court had no jurisdiction to enter any judgment on said verdict against said United Surety Company.

(*d*) That Sections 454 to 456, both inclusive, of the Code of Laws for the District of Columbia are unconstitutional and void under that provision of the Constitution of the United States, which declares that no person shall be deprived of his property, without due process of law, in so far as they attempt to permit or do permit a judgment against the surety upon an understaking given in said Section 454 to abide by and perform any judgment in relation to attached property upon the release of the same from the attachment without the submission to a jury of any question of fact relating to said property; or if said sections are to be construed as permitting a judgment to be rendered against such a surety for the appraised value of such property, and

are valid and constitutional to that extent then, upon a proper construction and application of said provision of the Constitution to this case, the rendition of a judgment herein for the value of said property, without the submission of the question of its value to a jury, would be a violation of said provision of the Constitution in that the record shows that there was no appraisement of the said value.

9. The Court of Appeals erred in holding and ruling that "the value of the property is conceded to be far in excess of the judgment," there being nothing in the record to show that any such concession was made.

10. The Court erred in other respects apparent of record.

ARGUMENT.

To economize time and space, the assignments of error will be embodied in a few propositions, presenting the questions arising upon the record.

I.

IF THE RULING OF MR. JUSTICE STAFFORD, THAT THE PRIOR ORDER OF MR. JUSTICE BARNARD, VACATING AND SETTING ASIDE THE JUDGMENT AS TO THE PLAINTIFF IN ERROR, OPERATED IN LAW TO VACATE AND SET ASIDE THE JUDGMENT AS TO THE DEFENDANT, THE SEMMES-KELLY COMPANY, AS WELL, IS TO BE CONSTRUED AS A VACATION OF SUCH JUDGMENT AS TO THE DEFENDANT, THE SEMMES-KELLY COMPANY, SUCH RULING WAS ERRONEOUS, AND SUCH VACATION OF THE JUDGMENT WAS ILLEGAL AND VOID, AS BEYOND THE POWER OF THE COURT.

(*This proposition is covered by assignment of error 2 b.*)

The plaintiff in error objected to the impanelling and swearing of the jury because of the existing judgment

against the defendant, but the trial court ruled that the order vacating the previous judgment as against the plaintiff in error, operated "in law to set aside the verdict and judgment as to the principal as well, and that the trial should proceed *de novo*." Accordingly, although there was no appearance for the defendant and no opportunity given it to appear, a new jury was sworn to retry the issue between the plaintiff and the defendant, notwithstanding the fact that the same issue had been tried by a former jury; and the plaintiff in error was compelled to assume the burden of acting as the defendant in the cause and setting up, as best it could, the defense which the defendant had to the plaintiff's claim. The plaintiff in error strenuously protested against this procedure, both on the ground already stated and upon the further ground that the court was without power or jurisdiction to modify or alter in any way an existing judgment of the court which had been enrolled, but nevertheless the trial was proceeded with.

It seems impossible to hold that this was a valid legal proceeding.

A judgment had been entered against two parties; it was recognized as a valid and subsisting judgment by the plaintiff and execution was issued upon it; it was then set aside as to one of the parties and left standing, without protest on the part of the plaintiff, as to the other party; the term expired at which the judgment was entered; the trial court months afterwards undertook, without notice to the party against whom the judgment had been left standing, to vacate it as to it, and to retry the issue which had been joined between it and the plaintiff; and thereupon a new verdict and judgment were entered for a different amount from that of the original verdict and judgment. Surely a judgment based upon such a proceeding can not be a valid one.

This court in Karrick vs. Wetmore, 25 App. D. C., 415, held that an action was not maintainable in this District on a foreign judgment, the judgment being null and void, where it appeared from the record of the proceedings leading up to such judgment that it was rendered without notice to the defendant, in place of a former apparently final judgment of dismissal of the cause, which it purported to strike out, and which was rendered five terms before, and where, while the cause stood dismissed the defendant had procured a final discharge in bankruptcy in another jurisdiction, which he did not plead because the clerk of the court informed him the suit was no longer pending; and the Supreme Court of the United States in affirming the judgment of this court in that case (205 U. S., 141), held that no judgment could be set aside after the expiration of the term at which it was entered, except for mistakes occurring from the misprison of the clerk, thereby emphatically reaffirming what it had already decided in another District of Columbia case, Phillips vs. Negley, 117 U. S., 665, and many other cases.

It may be argued that the plaintiff in error was in no position to object to the vacating and setting aside of the judgment against the defendant and retrial without notice to the defendant, of the issue which had been tried between it and the plaintiff. But the plaintiff in error respectfully submits that it had and does have a right to object to such procedure because it was vitally interested in the amount of any verdict and judgment that might be rendered against the defendant, because the recovery against the defendant measures its liability, and it was hence very much interested in the defendant's having an opportunity to appear and show what that verdict and judgment should be. As in Karrick vs. Wetmore, *supra*, the defendant had become a bankrupt since the first judgment was rendered against it

(R. 49), but the trustees in bankruptcy could and should have been called upon to defend.

At the beginning of the trial of this case the plaintiff in error objected to the swearing of the jury to try the issue which was made up in the case between the defendant in error and the defendant in the original suit, the Semmes-Kelly Company, on the ground that although the Supreme Court of the District of Columbia had vacated, as to the surety, a judgment which was rendered at a former trial of the case it left of record the judgment rendered against the Semmes-Kelly Company, so that there was nothing for the jury to determine as the case then stood. The trial court overruled the objection and in doing so filed a written ruling in which it was held that the order setting aside the verdict and judgment as to the surety operated in law to set aside the verdict and judgment as to the principal as well, and the case was ordered to be tried *de novo*.

This ruling was objected to both at the trial and in the Court of Appeals, but the Court of Appeals held that the common law rule in this country is that where a judgment against several defendants is vacated and a new trial granted as to part, the judgment as to all is set aside.

The court cites several cases to sustain this proposition, which we respectfully submit do not go to the extent it is necessary to go in this case and, to the extent they do go, sustain a principle of law, which is expressly disapproved and the correctness of which is denied by the great weight of authority in this country. The principle laid down seems to have originated in a careless and ill-considered expression from a very distinguished court in the case of Hall vs. Williams, 6 Pick., 232, wherein it was said that:

> "The judgment being entire, if it is a nullity with respect to one, it is also in the whole."

An analysis of the cases cited by the Court of Appeals in support of the proposition announced will show that they are all decided entirely upon precedent, and upon the long since exploded theory that a judgment is an entirety. No cases are cited in the opinions, except in the Maryland case, and in none of them, except that case, is the conclusion of the court supported by any kind of reasoning.

It will appear from a careful reading of the Maryland case that the court itself was not entirely satisfied with the conclusion it reached, and the case resulted as it did solely because the principle of the entirety of a judgment seemed to be at that day well established.

This doctrine that a judgment is an entirety and must stand or fall as a whole, while at one time was the accepted doctrine, has been, by the overwhelming weight of modern decisions, entirely exploded and abandoned.

The law on the subject is well stated in Freeman on Judgments, Section 136, as follows:

> "At a comparatively early day in American jurisprudence a dictum was pronounced to the effect that if a judgment is void as against one of the parties thereto, it is void as against all. This dictum was founded upon an early New York case declaring that on certiorari a judgment must be affirmed or reversed as a whole. That in many cases a judgment against two or more must be wholly reversed or vacated because void or erroneous as to one of them is true; but whether it is wholly void, if neither reversed nor vacated is an entirely different question. Upon what principle can a defendant before the court claim its judgment to be void as against him, when the court had jurisdiction over him, and over the subject-matter, and he chooses to take no measures to correct this error? Generally, the courts following the dictum mentioned above have contented themselves with citing it as their authority;

but so many of them had followed it that it was at one time very doubtful whether it was not sustained by the majority of the adjudications upon the subject. We think this doubt no longer exists, and that the decided preponderance of authorities maintains that a judgment against two or more is not void as against those of whom the court had jurisdiction though void as against others."

In the case of Mercer vs. James, 6 Neb., 406, one Woods, who was the maker of a promissory note which was signed also by one Button as surety, appeared in an action on the note and confessed his indebtedness thereon and requested judgment to be entered for the plaintiff although no process had been served against Button, and he had not appeared in the case. Judgment was thereupon rendered against both Wood and Button. It was held that although the judgment was void as against Button it was valid and enforcible against Wood.

In the case of York Banks' Appeal, 36 Pa. State, 458, it appeared that on February 24, 1858, one John A. Nevin, a member of the firm of Pflieger, Hess & Nevin, executed two judgment notes, under seal, in the name of the firm in favor of the York Bank. Judgment on these notes was entered against all three members of the firm on February 24 and February 25, 1858. On June 16, 1858, other persons obtained judgment notes from the same firm, which judgment was rendered against all members of the firm on June 17, 1858. Thereafter John Pflieger and Sallie A. Hess applied to have the judgments rendered against them in favor of the York Bank set aside on the ground that they did not join in the judgment notes given to the bank, which relief was granted. Thereafter certain real estate held by members of the firm as tenants in common was sold and the amount of Nevin's interest was ascertained to be $2,532.95,

which was claimed by both judgment creditors, the judgment creditor claiming under the last judgment on the theory that the judgment in favor of the bank, being set aside as to Pflieger and Hess, was also set aside as to Nevin, but the court held the York Bank entitled to his interest and in so holding used the following language:

> "It did not appear that Nevin had authority from his partners to bind them by a confession of judgment, and thereafter the two judgments he gave to the York Bank against the firm of Pflieger, Hess and Nevin were properly set aside as to Pflieger and Hess. But they bound him, Nevin. That a judgment confessed by one partner in the firm's name is good as between him and the creditor though void as to the copartners, has been often ruled and was distinctly recognized in Ridgway's Appeal, 3 Harris, 182, the case chiefly relied on by the appellees in this dispute. Good for what? Good not only as evidence of the amount of his indebtedness, but good also as a lien upon his land."

The change in the law on this question has been well expressed in the case of Neenan vs. The City of St. Joseph, 126 Mo., 89, where it was said:

> "The spirit of the law has been greatly changed and modified by the Code, and the later decisions, following this spirit have reached the conclusion that a judgment is not to be regarded as an entirety in the sense of not being amendable or subject to correction as to one of the parties unless the substantial rights of the others would be injuriously affected thereby."

That case was a bill in equity to vacate a judgment, which was to all intents and purposes the same as a motion to vacate a judgment.

The case of Kitchens vs. Hutchins, 44 Ga., 620, came be-

fore the court on a motion for a new trial. One of the defendants had been served with process, and the other had not and judgment had been rendered against both. The defendant, who had been served with process, moved for a new trial because his codefendant had not been served, but the court held that he was not entitled to a new trial and that although the judgment against the defendant not served was a nullity still the one served could not take advantage of that fact because the judgment against him was valid.

In the case of Cheek vs. Pugh, 19 Ark., 574 (which, of course, was decided after the Arkansas case cited by the Court of Appeals), it appeared that in a suit on an attachment bond the surety on the bond was not made a party as was required by the statute, and notwithstanding this fact judgment was rendered in the case against both the principal and surety on the bond. In that case it was held that while the judgment against the surety, under such circumstances, was void, yet as against the principal, it was valid.

The theory on which some of the cases attempt to sustain the doctrine established by Hall vs. Williams is that joint defendants in an action on contract have the right of contribution among themselves, and that the plaintiff can not, by a proceeding against one of such defendants, without proceeding against the others, deprive him of his right of contribution. No such question arises in the present case because the plaintiff in error being the surety, and the defendant against whom the judgment was obtained being the principal, the primary liability in the case was upon the latter.

It is hard to conceive how the court had the right to vacate and set aside a judgment against the Semmes-Kelly Company which, *by its confession*, it had agreed should be rendered against it, and proceed to try the issue again with-

out notice to the Semmes-Kelly Company and obtain a verdict and judgment for a larger amount than the judgment which it had confessed.

The theory that a judgment is an entirety has been expressly disapproved by the highest courts of the States of Nebraska, Ohio, New York, Arkansas, Georgia, Iowa, Illinois, Missouri, Pennsylvania and Virginia in the following cases, in addition to those already discussed:

Council Bluffs Savings Bank vs. Griswold, 50 Neb., 754;
Ash vs. McCabe, 21 Ohio State, 181;
Newburg vs. Munshower, 29 Ohio St., 617;
St. John vs. Holmes, 20 Wend., 609;
Murphy vs. Orr, 32 Ill., 489;
North vs. Mudge, 13 Iowa, 496;
Bailey vs. McGinness, 57 Mo., 362;
Holten vs. Towner, 81 Mo., 360;
Boyd vs. Ellis, 107 Mo., 394;
Jameson vs. Pomeroy, 9 Pa. St., 230;
Shallcross vs. Smith, 81 Pa. St., 132;
Ray vs. Stewart, 33 Gratt., 351.

II.

THE JUDGMENT AGAINST THE PLAINTIFF IN ERROR IS ILLEGAL AND VOID AS THERE WAS NO APPRAISEMENT OF THE DEFENDANT'S PROPERTY.

This proposition is covered by assignments of error 1-b, 3-c, 7-a, b, c; 8-a, b, c.

At the heart of this case is the question, what are the rights and obligations of a surety on such an undertaking as was given by the plaintiff in error; and this question, of course, can only be answered by a consideration of the sections of the Code which provide for such undertakings. Section 454 is as follows:

"Sec. 454. The attachment shall be levied upon personal chattels by the officer taking the same into his possession and custody, unless the defendant shall give to the officer his undertaking, to be filed in the cause, with sufficient security, to the following effect, namely:

A. B., plaintiff,
versus
C. D., defendant.
At Law, Numbered ——.

The defendant and —— —— his surety, in consideration of the discharge from the custody of the marshall of the property seized by him, upon the attachment sued out against the defendant, on the——— day of———— Anno Domini nineteen hundred ————, in the above entitled cause, appear and submitting to the jurisdiction of the court, hereby undertake, for themselves and each of them, their and each of their heirs, executors, and administrators, or successors or assigns, to abide by and perform the judgment of the court in the premises in relation to said property, which judgment may be rendered against all the parties whose names are hereto signed.

(Signed) C. D. (Seal.)
E. F. (Seal.)

Or unless the person in whose possession the property is attached shall give to the officer, to be filed in the cause, an undertaking in the following form or to the same effect, namely:

A. B., plaintiff,
versus
C. D., defendant.
At Law, Numbered ——.

Whereas by virtue of an attachment issued in the above entitled suit, the United States Marshal for the District of Columbia has attached certain property in the hands of the undersigned E. F., as garnishee, namely (here describe) of the value of ———— dollars; and now, therefore, the said E. F. and G. H., as surety, appearing in said suit, and submitting to the jurisdic-

tion of the court, hereby undertake for themselves and each of them, their and each of their heirs, executors, and administrators to abide by the judgment of the court in relation to said property, and that if the same shall be condemned to satisfy the claim of the plaintiff, judgment may be rendered against all of the undersigned for the value of said property and costs, to be executed against them, and each of them, unless said property shall be forthcoming to satisfy the judgment of condemnation.

(Signed) E. F. (Seal.)
G. H. (Seal.)

And in either of said cases the attachment shall be sufficiently levied by the taking of the undertaking, as above provided for; and in the latter case the recital of the undertaking shall contain a sufficient description of the property and its value, which value shall be ascertained by an appraisement to be made under direction of the officer and returned with the writ."

We thus see that Section 454 provides for two forms of undertaking in cases of attachments; the first—which was the form of undertaking given in this case—is where personal property in the possession of the *defendant* has been levied upon, and *he* desires a release of the property from the attachment; and the second is where personal property is in the possession of a *third person*, and *he* desires a release of the property from the attachment. In each case, the statute provides that the attachment shall be sufficiently levied by the taking of an undertaking.

Section 455 provides as follows:

"Sec. 455. Releases. Either the defendant or the person in whose possession the property was may obtain a release of the same from the attachment, after it has been taken into the custody of the marshal and the writ has been returned, by giving the undertaking required of him as aforesaid, with security to be approved by the court.

> The plaintiff may except to the sufficiency of any undertaking accepted as aforesaid by the marshal and, if the exceptions be sustained, the court shall require a new undertaking, with sufficient surety, by a day to be named, in default of which he shall be liable to the plaintiff, on his official bond, for any loss sustained by the plaintiff through such default.
>
> If the property attached be delivered to the defendant upon his executing an undertaking as aforesaid, and judgment in the action shall be rendered in favor of the plaintiff, it shall be a joint judgment against both the defendant and his surety or sureties in said undertaking for the appraised value of the property."

The undertaking given by the plaintiff in error, which is in strict compliance with Sec. 454, provides that the defendant and surety submit to the jurisdiction of the court and "undertake to abide by and perform the judgment of the court in the premises in relation to said property, which judgment may be rendered against all of the parties whose names are hereto subscribed." It was not, however, approved by the court as required by Sec. 455, but was endorsed as satisfactory by the attorney for the plaintiff.

It is doubtful whether the property sought to be attached was ever actually levied upon, as the testimony shows that all that Mr. Cusick, the deputy marshal, did was to go to the place of business of the defendant corporation and serve the writ of attachment upon its president. He says that Mr. Robison, the chief deputy marshal, telephoned him not to have an appraisement made, but to ask the president if he had $20,000 worth of stock, and that Mr. Semmes said that he had a great deal more than that, and that the president took him over the store and showed him a large amount of goods and cases (R. 38). Asked how long he remained in possession of the store, Mr. Cusick replied, "Pretty much all the afternoon. I left there late in the

evening" (R. 39). He testified he was called off by Mr. Robison. It is doubtful, therefore, whether there was an actual levy made. This is perhaps immaterial in one sense as Sec. 454 provides that the attachment shall be sufficiently levied by the taking of the undertaking, but is very material in another, because, if there was no actual levy, or that levy was released, the constructive levy occurred only when the undertaking was executed, which was on April 23d, the day after the attempted actual levy, or its release.

It will be observed that Sec. 455 plainly and clearly provides for the form of judgment to be entered if in favor of the plaintiff where the property is delivered to the defendant as was done in this case. The section says, "It shall be a joint judgment against both the defendant and his surety or sureties in said undertaking for the appraised value of the property."

That there was no appraisal of the value of the property is one of the clearly established facts in the case. The so-called schedule of levy attached to the marshal's return shows the form to be filled in by the appraisers was never filled in (R. 6). Mr. Justice Barnard in his opinion of October 21, 1910, in referring to the judgment which he was asked to set aside said, "Judgment could not have been properly rendered against the defendant and surety company for $20,000, the alleged appraised value of the property attached, because the record shows that no appraisement was made" (R. 27). As already shown, Mr. Cusick, the deputy marshal, testified that Mr. Robison, the chief deputy marshal, told him by telephone at the time the writ of attachment was served not to have an appraisement made (R. 38).

Mr. Robison himself testified that the stock of goods was "not appraised," but that on the so-called schedule he wrote in the $20,000, from information that was given him

either by Mr. Douglas, the defendant's attorney, or Mr. Semmes; that he, Mr. Robison, knew this was the fact because he never saw the goods himself (R. 39). Again, Mr. Robison testified "No appraisement was made by the appraisers and it was the understanding at our office that the bond was to take the place of the appraisement" (R. 47).

Lastly, the judgment complained of itself recites that no appraisers were appointed (R. 34).

So that it must be taken as proven beyond all question that the property in question was never appraised. It is true that Mr. Semmes told Mr. Cusick, the deputy marshal, that the property was worth over $20,000 and that this statement was repeated by the deputy marshal to the chief deputy marshal, Mr. Robison, who, acting upon that information thus obtained, inserted in the so-called schedule attached to the return that the stock of goods was valued at this sum. But this valuation made by Mr. Semmes was simply his personal estimate of the valuation of the goods, was made before the plaitniff in error signed the undertaking, and when no representative of the plaintiff in error was present and without the knowledge of the plaintiff in error, and neither Mr. Ricketts, its agent, nor Mr. Donaldson, its attorney, had any knowledge of it until long after the undertaking was given, as is clearly shown by their testimony. It would, therefore, appear to be perfectly clear that this statement of Mr. Semmes and his valuation of the goods can have no bearing upon the obligation of the plaintiff in error upon the undertaking.

As already stated, the trial court found, in the judgment complained of, that there were no appraisers appointed, but that from Mr. Semmes' uncontradicted testimony, the stock of goods which had been attached was worth $20,000, and in the judgment the court offered to permit the plaintiff in error to introduce other evidence as to the value of the

goods, or, if so advised, to submit the question to another jury. By these recitals in the judgment it would appear to be clear that the court held that the valuation of $20,000 mentioned in the so-called schedule attached to the return to the writ of attachment, was not equivalent to an appraisement. It may, however, be contended by the defendant in error that, notwithstanding such findings of fact by the court, the attempted valuation of $20,000 was, for the purpose of this case, an appraisement. A few words on this subject, therefore, will be pertinent.

As hereinbefore shown, Mr. Robison testified that he wrote the words "Valued at $20,000" in the so-called schedule from information given him over the telephone by Mr. Cusick, as to what Mr. Semmes had told him, Cusick, the value of the goods was. Mr. Robison testified that the "return was not made until after the undertaking was filed" (R. 42). It is true he adds that he is "pretty clear the paper was written by him before the bond was given," but the evidence of Mr. Ricketts and Mr. Donaldson is perfectly clear and emphatic that they did not see the paper attached to the marshal's return until after the undertaking was signed, Mr. Ricketts stating that he never saw it until the trial (R. 43), and Mr. Donaldson stating that he did not see it until after he signed the undertaking (R. 46). It is therefore clear that when they signed the undertaking they did not know of this paper and the same was not of record, because the return of the writ to which it was attached was not made until after the undertaking was executed. Of course, until the return was made to which this paper was attached, the paper was not of record in this case, and until that time, the plaintiff in error could not be said to have had constructive notice of it. If it had been seen by the agent and attorney of the plaintiff in error before they signed the undertaking, or if it had been at that time of

record in the case it might be argued that they were thereby estopped to deny the value of the property as therein given; but even then this estoppel would not justify the entry of a judgment under the statute against the surety company, especially in view of the fact that the statute makes no provision whatever for the court or jury to try and determine such question of estoppel. Under such circumstances, the only way the question could be raised would be in a suit by the plaintiff against the surety on the undertaking as a common law obligation. But this, of course, is a moot question. The fact is that the so-called valuation of $20,000 of the property was not known to the plaintiff in error, when its agent and attorney signed the undertaking, and was not at that time of record in the case, and they had no means of knowing that Mr. Robison had written such a valuation in the so-called schedule, based upon a telephone conversation with Mr. Cusick.

The plaintiff in error, when it became surety on this undertaking had the right to assume that every requirement of the statute necessary to fix its liability, including the legal and proper appraisement of the attached property, would be met and complied with, and clearly it was not chargeable with the duty to see to it that the statute was followed by the plaintiff or the marshal, so far as the appraisement was concerned.

The trial court seems to have attached some importance to the testimony of Mr. Semmes as to the valuation of the property attached, for in the judgment it is recited that "it appears from the uncontradicted testimony of Mr. Semmes that the stock of goods levied upon was worth more than $20,000 at the time of the levy." It is repectfully submitted that this recital in the judgment is entitled to no consideration whatever, because there is no warrant of law for the valuation of attached property in any such way.

It is also true that the judgment in question recites that the trial court offered to permit the plaintiff in error to introduce other evidence as to the value of the stock of goods if it so desired or, if so advised, to submit the question of the value of the goods levied upon to a jury to be summoned and selected for that purpose, and that the plaintiff in error declined to take advantage of either of such offers. But the statutes can be searched in vain for any authority on the part of the trial court to itself determine the value of the attached goods years after the attachment was laid, or to summon a jury for that purpose. The statute, as already shown, clearly provides for a joint judgment against the defendant and his surety for the appraised value of the property, showing unquestionably that the liability of the surety is to be determined by an appraisement of the property to be made in a legal way at the time of the giving of the undertaking.

It should be observed here that although the trial court admitted testimony to show that the plaintiff in error at the time of the giving of the undertaking had waived an appraisement of the value of the attached property (with the result that the testimony overwhelmingly negatived this claim of the defendant in error), the court failed to make any finding on this point at all. As the court saw fit to make findings of fact in its judgment in favor of the defendant, it would seem to us that if it was justified in making findings at all, a finding should have been made in favor of the plaintiff in error on this subject of the alleged waiver of an appraisement by the plaintiff in error.

The then chief justice of the trial court who caused the first judgment in this case to be entered upon the minutes seemed to have realized that the form of the judgment must follow the statute, for that judgment was a joint judgment against the defendant and its surety for $20,000, which it recites was the appraised value of the property attached.

(R. 15.) The difficulty with that judgment was, that the record clearly shows, as Justice Barnard afterwards pointed out in his opinion, that there had been no such appraisement, and he accordingly set it aside as to the surety, although he left it standing as to the defendant.

Mr. Justice Stafford, however, by the judgment complained of, although determining as a matter of fact that there was no appraisement of the property as required by the statute, attempted to find as a matter of fact what the valuation of the property was. But apparently realizing that that was not altogether right, as no issue had been made up for trial or tried as to the value of the property, he offered to permit the surety company to introduce other evidence as to its value, or to submit the question of the value to another jury to be summoned and selected for that purpose.

Our contention in this case is, that under sections 454 and 455 of the Code, where a person or corporation signs, as surety, an undertaking for the return to the defendant of the property attached, there must be an official appraisement, at the time, of the value of the property; that this appraisement limits the liability of the surety on the undertaking; that the surety is not charged with the duty of seeing that the appraisement is made, but that this duty devolves either upon the plaintiff in the action or upon the United States marshal; and that if such appraisement is made and the plaintiff in the action recovers a verdict, there may be forthwith entered against the surety a judgment for the amount of the recovery, provided such recovery does not exceed the amount at which the property was so appraised. But if, for any reason, an undertaking, such as we have here, is given without an appraisement having been made, the plaintiff is absolutely precluded from taking a judgment under the statute against the surety on the bond

in the pending action between the plaintiff and the defendant. In that event, the undertaking must be regarded as a common law undertaking and the rights of the plaintiff thereunder, if any, must be asserted in a separate action on the undertaking against the plaintiff and the surety, in which action all questions of waiver or estoppel, or kindred questions can properly be raised and determined.

(Where attached property is not appraised on the giving of a retaining bond, the plaintiff in attachment is compelled to resort to an action on the bond. R. A. Faulkner & Co. v. Cook (Ark.), 103 S. W., 384; Turner v. Collier, 37 Ark., 532; Wright v. Manns, 111 Ind., 422.)

Unless the interpretation we are here urging is given to the statute, the anomalous conditions that are presented in this case are bound to be repeated in subsequent cases involving the same facts.

The error of the trial court was committed in its effort to try out the questions between the plaintiff and the plaintiff in error, surety in the action between the plaintiff and the defendant. Although the statute makes absolutely no provision for the trial of any issue between the plaintiff and the surety, the trial court undertook to create such an issue, found that the issue was the value of the property which had been levied upon; decided the issue by finding that the property was worth $20,000, and then being dissatisfied apparently with this finding, offered to permit the plaintiff in error to adduce evidence as to the value of the property, and still not being satisfied with having made this offer, made the offer to the surety to impanel a jury to pass upon the question of the value of the property. It surely will have to be admitted that the court had no right to make any such finding or to make any such offer to the plaintiff in error. The proceeding so far as the surety was concerned was purely a statutory one, and it was the duty of the court to

follow the statute and not to attempt to permit the litigation of questions not in issue. There was no issue joined between the plaintiff in error and the defendant in error as to the value of the property in question; there was no issue between them as to whether the plaintiff in error had waived an appraisement of the property, or was estopped to deny any valuation that had been placed upon the property; there was no authority in the court to hear testimony relative to the value of the property in question; and lastly, there was no provision of law for the impanelling of a new jury to pass upon the value of the property. All of these questions, if they could be raised at all, between the plaintiff in error and the defendant in error, would have to be regularly raised in an action by the defendant in error against the plaintiff in error on the undertaking. There an issue would be made which would be regularly tried and determined.

It will be observed that the judgment complained of reads more like a decree in equity than a judgment of a court of law. It contains findings of fact and conclusions of the court upon such findings. Nowhere in the attachment statutes do we find any provision for such findings, or any provision for making up of issues between sureties and plaintiffs in attachment suits growing out of disputes of the rights and obligations of the parties upon the undertaking.

As will be hereafter pointed out, if the trial court is permitted by the statute to make up and try such issues, the statute is plainly unconstitutional and void for it provides for the submission by the surety to the jurisdiction of the court and the entry of a summary judgment against him without any hearing whatsoever. Under the statute so construed, it would be possible to enter up a summary judgment for any amount against a surety, without any knowledge whatever on his part of the intention so to do.

The proposition above discussed, namely, that in order

to hold a surety on an attachment bond or undertaking, the statutory requirement for an appraisement must be complied with has been determined in the affirmative by the overwhelming weight of authority in this country.

Turner v. Collier, 37 Ark., 528.
Faulkner v. Cook, 103 S. W., 384.
Richard v. Mooney, 39 Miss., 357.
Phillips v. Harvey, 50 Miss., 489.
Lowenstein v. McCadden, 54 Ark., 13.

In the case of Turner vs. Collier, *supra*, Collier sued Turner for a debt, and issued an attachment before judgment which was levied upon cotton supposed to belong to the defendant. Third parties came in and claimed the property attached, and gave a bond as required by the statute for the release of the property. The bond was in the sum of one thousand dollars ($1,000), (the statute requiring the bond in twice the value of the attached property), and was conditioned that they would interplead for the cotton, and that if plaintiff recovered judgment against the defendant they would deliver the said property to the sheriff when demanded; otherwise that the bond should have the force and effect of a judgment for the appraised value of the property attached. The defendant and the interpleader were both unsuccessful, and the verdict of the jury was for the plaintiff, and judgment on both issues was rendered on the same day. The judgment recited the levy of the attachment on the cotton, the bonding of the same, and the verdict of the jury, and it was adjudged that the plaintiffs have "execution against the 21 bales of cotton attached in this suit, and if the same be not delivered to the sheriff of Jefferson county by said interpleaders on demand, that execution issue on return of the facts on *fieri facias* by the sheriff against the securities on the interpleader's bond for the

sum of $1,000 or so much thereof as will be sufficient to satisfy the said debt, damages and costs as aforesaid."

In the State of Arkansas there was a statute providing for the release of property levied upon under an attachment upon the giving of a bond in a sum double the value of the property, which value the statute required should be ascertained by the oath of two citizens of the county where the writ is levied to be chosen by the sheriff.

If such delivery is not made the statute provides that the bond shall have the force and effect of a judgment for the appraised value of such property and costs of the interpleader, if such appraised value be less than the amount of the judgment rendered, and if more, for the amount of such judgment.

In construing this statute the court in that case used the following language:

> "It is very plain that the appraisement of the property under the directions of the sheriff is an indispensable foundation and basis of the whole statutory proceeding. That should be shown by the first return and thus made a part of the record. The courts can not safely presume the appraised value of the property to have been actually made, less can they presume that it was actually half the amount of the bond. The parties might have been willing to give, and the sheriff would certainly be authorized to take a bond for ten times the value of the property, still without the specific guides afforded by the valuation, the courts can not proceed to direct the clerks to enforce the statutory regulations."

In that case the judgment entered against the sureties on the bond was reversed.

In the case of Faulkner vs. Cook, *supra*, it is held that under the Arkansas statute providing that the appraisement shall be made in a particular way does not contemplate the

assessment of the value of the property attached by the jury on the trial of the issue of the claimant's ownership.

The case of Richard vs. Mooney, *supra*, was an action in which an attachment was issued, and the property released upon the giving of a bond. The statute of Mississippi provides that judgment shall not be entered against the surety for a sum greater than the assessed value of the property, and that the said value shall be assessed by the court or jury trying the issue. Upon the trial of the case the verdict was simply for the amount due from the defendant to the plaintiff without the assessment of the value of the goods attached, and the court held that judgment could not be rendered against the surety for such an amount, and in so holding used the following language:

> "The replevin bond was executed under the provisions of the eighth article of the act in regard to attachments. It was, therefore, the duty of the jury to assess the value of the property which was taken under the attachment and replevined. The jury having omitted to assess the value of the property, it was error to render any judgment against the surety which was done in this case for the amount of damages found for the plaintiff. The statute is express that, whatever the amount may be which is found to be due to the plaintiff, any attachment judgment shall not be entered against the surety for a sum greater than the assessed value of the property. Here, as there was no assessment of the value of the property, no judgment should have been rendered against the surety."

It is apparent from a mere reading of our statute that no judgment can be rendered under it for a sum greater than the appraised value of the property for the statute is explicit in providing that the judgment shall be *"for the appraised value of the property."*

In the case of Phillips vs. Harvey, *supra*, it was held to be error to render judgment against the sureties on a release bond for the whole amount of the plaintiff's demand, because they were liable only for the assessed value of the property, and when the jury has omitted to assess the value of the property there can be no judgment against the sureties.

The same was held to be the law in the case of Lowenstein vs. McCadden, *supra*, wherein it was held that a judgment upon a statutory forthcoming bond could not be rendered unless an assessment was made of the value of the property retained by the principal in the bond.

In Drake on Attachment, Sec. 242, that author says:

> "Where the law provided that judgment should not be entered against the surety for a sum greater than the assessed value of the property, it was decided, that if there was no assessment of its value, there could be no judgment against the surety."

The Court of Appeals, in its opinion, says it is conceded by the plaintiff in error that the value of the property attached is far in excess of the judgment. The record in the case may be searched in vain for any such concession, and the court is mistaken in assuming that such concession has been, at any time, made in this case. The plaintiff in error has contended from the very beginning that, under the statute, the court had no jurisdiction to hear testimony upon, and itself determine, the value of attached property so as to obviate the statutory requirement for an appraisement, and it has never conceded anything as to the value of the property attached because it has contended that there was no legal way in which that value could be ascertained in view of the fact that a regular appraisement had been omitted.

The word "appraisement" as used in this statute is not a word of doubtful meaning, and taking the statute as a whole it clearly requires that the appraisement be made at the time the attachment is levied and under the direction of the United States Marshal, the levying officer.

The Court of Appeals holds that no appraisement is necessary when the property is attached in the hands of the defendant, and this in the face of the specific requirement that the judgment against the surety shall *be for the appraised value of the property*. It holds that the appraisement referred to in the statute only applies where the value of the property attached is not sufficient to satisfy the amount of the judgment in favor of the attached creditor, and it holds that in such event the court shall ascertain the value of the property. We submit that there is nothing in the statute authorizing the court to ascertain the value of attached property in any event, and that the statute is specific in providing that the judgment shall be for the appraised value of the property, and by the word appraisement, we submit, is meant an appraisement at the time the property is attached, and before the undertaking is executed. If the Court of Appeals is correct in its construction of the statute, it is hard to conceive how it can be determined in what instances the court should ascertain the value of the property. How is it to be determined whether or not the property attached is sufficient to satisfy the amount of the judgment unless the property is appraised? How is a surety to ascertain the limit of its liability unless an appraisement is made? Is it necessary, under the statute, to wait until the case is reached for trial (in some cases years after the attachment is levied), before the value of the property and the limit of the liability of the surety is determined? As the property by the giving of the undertaking has been released and delivered to the defendant, who may have sold or otherwise dis-

posed of it, how can it then be appraised or valued? It is respectfully submitted that Congress could not have intended to have a subsequent valuation or appraisement of the property by the court, when it enacted this statute and provided that the judgment against the surety should be for the appraised value of the property. Attachment statutes are to be strictly construed, and litigants claiming the benefits of the statutes must strictly comply with all their terms.

The intention of Congress as to the way in which an appraisement should be made is shown in the last clause of Section 454 of the Code, in which it is said that the value of the property attached shall "be ascertained by an appraisement *to be made under direction of the officer and returned with the writ.*" It is true that this particular clause appears in connection with the enumeration of the necessary recitals of an undertaking given by a third party in whose possession the property attached is found, but it clearly indicates what Congress meant by the word appraisement as used in the last paragraph of Section 455 of the Code. Congress, having in effect defined what it meant by the word appraisement under Section 454, must be considered to have given the same word the same meaning in the following section dealing with the same subject, especially in view of the fact that it did not indicate any different meaning.

III.

THE PERSONAL JUDGMENT OF MAY 19, 1910, HAVING BEEN RENDERED AGAINST THE DEFENDANT FOR THE AMOUNT OF THE PLAINTIFF'S CLAIM, AND THE PLAINTIFF HAVING TREATED THAT JUDGMENT AS A VALID JUDGMENT AGAINST THE DEFENDANT AS IS EVIDENCED BY ITS HAVING ISSUED ON AUGUST 16, 1910, A FI. FA. ON THE JUDGMENT AND HAVING CAUSED TO BE ISSUED ON AUGUST 30, 1910, A WRIT OF ATTACHMENT ON THE JUDGMENT, ABANDONED AND WAIVED ALL RIGHT TO HAVE ENTERED A SUBSEQUENT JUDGMENT AGAINST THE APPELLANT UPON THE UNDERTAKING.

This proposition is covered by assignments of error 1-a, d; 3-a, b.

Of course, if the position we have previously taken herein be correct, it is unnecessary to consider the assignments of error under this proposition.

The judgment of May 19, 1910, was, in form, a joint judgment against the plaintiff in error and the defendant for $20,000 to be released upon payment by them to the plaintiff of $8,748.29. On August 16, 1910, the plaintiff caused a fi. fa. to be issued on the judgment and on August 30, 1910, caused a writ of attachment to be issued thereon (R. 15). The plaintiff in error moved to stay execution upon and vacate the judgment as to it (R. 15-16). The order of the court of October 21, 1910, ordered that the judgment of May 25, 1910, be set aside, vacated and for nothing held "as against the United Surety Company" unless the plaintiff enter a remittitur. The plaintiff declining in open court to enter a remittitur, the court set aside, vacated and for nothing held the judgment *as to the United Surety Company* (R. 29). On the record, therefore, the judgment remained against the defendant, and the plaintiff

made no effort whatever to have it set aside during the term at which it was rendered. It had a perfect right to execute the judgment so far as the defendant was concerned by causing to be issued a writ of execution upon it and it will hardly be contended that if the plaintiff had caused such a writ to be issued and had seized the defendant's property under it, that the court would have quashed the writ on the ground that Mr. Justice Barnard's action in vacating the judgment as to the surety had had the effect of vacating it as to the defendant.

The weight of authority seems to be that in attachment suits, the plaintiff by taking a personal judgment against the defendant loses his lien against any property which has been seized under the writ of attachment.

Gilbert vs. Gilbert, 33 Mo. App., 259.
Schieb vs. Baldwin, 22 Howard Pr., 278.
Lowry vs. McGee, 75 Ind., 508.
Smith vs. Scott, 86 Ind., 346.
Sannes vs. Ross, 105 Ind., 558.
U. S. Mortgage Co. vs. Henderson, 111 Ind., 24.
Gass vs. Williams, 46 Ind., 253.
Capital City Dairy Company vs. Plummer, 20 Ind. App., 409.
Moore Co. vs. Billings, 46 Ore., 401.
Staunton vs. Harris, 56 Tenn., 578.
Hall vs. Walbridge, 2 Aiken (Vt.), 215.

In the case of Schieb vs. Baldwin, *supra*, it was held that the entry of a judgment in a suit supersedes the attachment which becomes of no force, and the property of the defendant can not be seized under it.

The case of Lowry vs. McGee, *supra*, is very much in point. It was a suit for the possession of real estate. One of the parties got title from a sheriff's sale in execution of a judgment rendered February 25, 1873. The other party

claimed under a like chain of title by reason of a judgment rendered April 16, 1872. The party claiming under the judgment of February 25, 1873, based his claim to priority of title by reason of an attachment before judgment, which was issued when the case was first filed, which was before the rendition of the judgment of April 16, 1872. There were no proceedings had on the attachment issued therein but there was taken a simple personal judgment against the defendant. The court held that this priority could not be upheld for the reason that by the taking of the personal judgment, the attachment was abandoned.

In the case of U. S. Mortgage Company vs. Henderson, *supra*, it was held that where an attachment proceeding is instituted auxiliary to an action for the recovery of a debt, and a personal judgment taken without adjudication of the proceeding in attachment, the latter will be deemed abandoned.

In the case of Capital City Dairy Company vs. Plummer, *supra*, the plaintiff sued several persons on a joint obligation and attached property supposed to belong to a partnership composed of the defendants. He only got service on one of the defendants, and took a personal judgment against him. Afterwards the other defendants came in and answered, praying for judgment for them both on the debt and on the attachment, on the ground that the plaintiff having taken a personal judgment against the party served, thereby abandoned the attachment proceedings, and the judgment stood as though no attachment had been commenced. This view was concurred in by the court, and judgment rendered.

Cases could be multiplied indefinitely to sustain the above contention, but it is deemed unnecessary to pursue the matter any further. All of the cases above cited sustain the cases which have been discussed.

The authorities also seem to be clear that the taking by the plaintiff of a personal judgment is a waiver and abandonment of his rights against the surety on the bond or undertaking.

Smith vs. Scott, 86 Ind., 346.
Sannes vs. Ross, 105 Ind., 558.
Gass vs. Williams, 46 Ind., 253.
Hardcastle vs. Hickman, 26 Mo., 475.
Urbanski vs. Manns, 87 Ind., 585.
Wright vs. Manns, 111 Ind., 422.

In the case of Smith vs. Scott, *supra*, Smith sued one Sarah Campbell and attached certain personal property. She gave a forthcoming bond with Scott as surety, and afterwards left the State, taking the property with her. Smith took a personal judgment against her, and afterwards sued Scott on the forthcoming undertaking. It was held that the surety on the undertaking was not liable but that by taking the personal judgment against Campbell, Smith had released the attachment and could not recover on the bond.

The case of Sannes vs. Ross, 105 Ind., 558, was also an action on an attachment bond. The plaintiff after introducing evidence of the proceedings in attachment and the seizure of the property thereunder, showed that a judgment *in personam* alone had been taken. It was held that by the showing of the personal judgment his suit on the attachment bond was defeated because of the fact that the taking of such a judgment dismissed the attachment and released the bond.

Another interesting case on an attachment bond is that of Hardcastle vs. Hickman, *supra*. The condition of that bond was that the obligors should pay the amount of any

judgment in the suit so commenced by attachment. The court held that the proper construction of the statute under which the bond was given, and the proper construction of the bond was that it obligated the maker of the bond to pay any judgment which might be entered on the attachment, and that it was not answerable to a general judgment against the defendant.

In the case of Urbanski vs. Manns, 87 Ind., 585, the question which we are now considering came up in a rather peculiar way. In that case there was a suit filed and attachment levied upon the property of Urbanski. It was returned to him upon his giving bond conditioned that the sureties would on failure to deliver the attached property pay the full appraised value of said property to the extent of any judgment. There was a personal judgment against Urbanski and there was afterwards a motion filed to correct the judgment to cover the attached property. To this the sureties objected, but the court held that by so correcting the judgment none of their rights would be affected, and that they were not liable on the judgment entered in that way.

The same case came before the court again in Wright vs. Manns, reported in 111 Ind., 422. This was a suit brought on the undertaking filed in the other case.

The condition of the bond was that the principal and sureties undertook that the principal would properly keep and take care of the attached property and would, on demand, deliver to the sheriff the said property, or if failing to do so they would pay the full appraised value of the said property to the extent of any judgment which might be rendered against the principal, together with costs. A personal judgment was taken against Urbanski, and afterwards an order *nunc pro tunc* was passed to cover the attached property; in the meanwhile the sureties having given up indem-

nity held by them. The court held in that case that the sureties were relieved from liability on the undertaking by reason of the fact that the plaintiff elected to take a personal judgment against Urbanski.

IV.

IT WAS ERROR FOR THE TRIAL COURT TO PERMIT THE WITNESS CUSICK TO RELATE HIS TELEPHONE CONVERSATION WITH MR. ROBISON, THE CHIEF DEPUTY MARSHAL, ON THE OCCASION WHEN THE WITNESS WENT TO THE STORE OF THE DEFENDANT TO LEVY THE ATTACHMENT; AND ALSO TO REFUSE TO STRIKE OUT THE TESTIMONY OF THE WITNESS AS TO SUCH CONVERSATION. (R. pp. 38-39.)

(*This proposition covers Assignments of Error Nos. 5 and 6.*)

The ground of the objection to this testimony was that what the witness was called upon to testify to and what he did testify to transpired in the absence of any representative of the plaintiff in error, the surety company, and it was, therefore, in no wise binding upon it.

Plainly, it was error to permit this testimony to be given, and it calls for a reversal of the judgment complained of, unless this court can say it was not reversible error. It will be difficult to successfully contend that it was not testimony prejudicial to the plaintiff in error, for it was testimony well calculated to prejudice the jury against the plaintiff in error, which they knew were seeking to prevent the entry of a judgment against it on the undertaking. It will be argued, of course, that no question to which this testimony was pertinent was submitted to the jury by the court, and that the jury was not called upon and did not make any finding upon

the subject. But other questions were submitted to the jury in which the plaintiff in error was interested, and it is impossible to say what impression was made on the minds of the jury by the admission of the testimony in question and how far it influenced them in determining adversely to the plaintiff in error such other questions.

The Court of Appeals held the testimony unimportant because it went to the value of the goods which it held was conceded. As heretofore stated, no such concession has, at any time, been made.

The Constitutional Questions Involved.

(See Assignments of Error 1-e and f (R.55), 7 d (R. 57), and 8 d (R. pp. 57 and 58).)

As heretofore shown, Section 454 of the Code D. C. provides for the form of undertaking which was given in this case, and Section 455 provides for the form of judgment to be entered on the undertaking in the event of judgment being for the plaintiff. The undertaking prescribed for the submission of the plaintiff and the surety to the jurisdiction of the court and the promise by them to abide by and perform the judgment of the court in the premises in relation to the property attached, which judgment the undertaking provides may be rendered against all of the parties whose names are signed to the undertaking. The judgment provided for in event of a judgment in favor of the plaintiff is a "joint judgment against both the defendant and his surety or sureties in said undertaking for the appraised value of the property."

The Court of Appeals in Tenney vs. Taylor, 1 App. D. C., 223, had occasion to consider the subject of the undertakings on appeal, then in use in the Supreme Court of the District of Columbia. In that case the lower court had entered

summary judgments on four appeal undertakings upon appeals having been affirmed, and a bill in equity was filed to enforce the judgments. The defense of the surety was that the judgments were invalid. Three of the undertakings in question contained no provision for submission to the jurisdiction of the court and no agreement on the part of the surety that judgment might be entered against him. The court held that the judgment on such undertakings by the trial court were utterly void for the reason that the court had in no manner acquired jurisdiction of the person of the surety and was without authority to render any judgment against him. The other undertaking was given "to abide by, perform and pay the judgment of the court." It contained no waiver of process or submission to the jurisdiction of the court. The court held that a mere undertaking to perform the judgment of the court does not give that court jurisdiction to render judgment against him and does not imply any submission to the jurisdiction of the court so far as to authorize judgment. It was accordingly held that the judgment on that undertaking was for the same reason void. With respect to the provision in such undertakings for the appearance and submission of the principal and surety to the jurisdiction of the court, the court in that case said:

> "Whether such submission and agreement was effectual as a waiver of a 'day in court' and 'due process of law' to which every individual is entitled by common right, public policy and Constitutional guaranty, we express no opinion."

In the case at bar the undertaking does contain such submission to the jurisdiction of the court and one of the questions here presented is whether it is effectual as such a waiver.

In Tenney vs. Taylor, the court was considering appeal undertakings by which the plaintiff and surety undertook to pay the judgment appealed from if it should be affirmed. Under such an undertaking, it will be observed, that if the judgment appealed from is affirmed, liability of the parties on the undertaking is thereby automatically fixed. It immediately attaches and there is no need for any inquiry of fact to determine such liability. In the case, however, of such an undertaking as was given in the case at bar, namely, an undertaking to secure the return of attached property, a judgment for the plaintiff against the defendant does not necessarily of itself establish the quantum of recovery against the surety. The undertaking contains no promise to pay any judgment that may be rendered against the defendant, but merely contains a promise on the part of the surety "to abide by and perform the judgment of the court in the premises in relation to said property." Ignoring for the moment the provision of Section 455 that the judgment shall be a joint judgment against the principal and surety for the appraised value of the property, the surety upon giving the undertaking can not know what kind of a judgment the court will render "in relation to the property." By the giving of the undertaking the defendant has secured possession of the property. Suppose the plaintiff is successful in the action. It may then appear that the defendant has consumed or finally disposed of the property. In that event, what judgment is to be entered? Strictly speaking the court can make no judgment in relation to the property except the ineffectual one that the property shall be returned to the marshal and shall be condemned to pay the plaintiff's claim. But suppose the court may as it did in the case at bar enter such a judgment for the return of the property within a prescribed period, in default of which the defendant shall pay a certain penalty. Is the surety to be bound

by that judgment without hearing or opportunity for a hearing? Is he not to have his "day in court" to show that the value of the property was less than the amount of the plaintiff's recovery? The court may fix a penalty twenty times in excess of the plaintiff's recovery in order to coerce the defendant to return the property. Is the surety to be held liable for such a penalty without hearing and without opportunity for hearing—without his "day in court"? The statute gives him no right to appear but in terms authorizes the entry of a summary judgment against him. Or suppose the judgment is in favor of the defendant to the action? What then are the rights or obligations of the surety? The undertaking still exists and is an outstanding promise on the part of the surety to abide by and perform any judgment of the court in relation to the property. No provision is made by the statute for the release of the undertaking or for the discharge of the surety.

Now, if the provision of Section 455 that if judgment in the action shall be rendered in favor of the plaintiff it shall be a joint judgment against both the defendant and his surety for the appraised value of the property, is to be read in and considered part of the undertaking, what are the rights and obligations of the surety?

It surely can not be said that the surety has done more than to agree to be liable for the appraised value of the property, which value may be very much less than the claim of the plaintiff against the defendant. But the statute contains no provision as to how or by whom the appraisement shall be made. Section 454 does say that where the property in possession of a person *other than the defendant* is sought to be released, "the value shall be ascertained by an appraisement to be made under the direction of the officer and returned with the writ," and provides that the undertaking shall recite such value. But *where the defendant*

himself is in possession of the property attached and desires to secure its release, the statute is wholly silent as to how the value shall be ascertained. It simply provides that in the event of a judgment for the plaintiff it shall be a joint judgment for the plaintiff against both the defendant and his surety for the appraised value of the property, without providing how and by whom the appraisement shall be made. Of course, if the appraisement in the latter case is held to be the same sort of appraisement as is provided for in the former case, then this record shows that no such appraisement was made, and, as hereinbefore contended, there can be no valid judgment entered under the statute against the plaintiff in error.

But, if the statute means what the defendant in error contends for, what the trial court in this case did, and what was approved by the Court of Appeals, namely, that the trial court may take testimony itself as to the value of the attached property, or summon a jury to ascertain its value, thus making the appraisement itself, or impanel a jury to do so, the statute is plainly unconstitutional, for no provision whatever is made for any hearing or opportunity for a hearing by the surety. In other words, the surety is not given "his day in court," and his rights are attempted to be taken away without due process of law; and the mere fact that he has agreed to submit himself to the jurisdiction of the court can not be said to be a waiver of this constitutional right.

In Beall vs. New Mexico, 16 Wall., 535, the Supreme Court of the United States held that a statute authorizing judgment against the sureties on an appeal bond as well as against the appellants in case of affirmance is not unconstitutional, but the reasons which led the court to this conclusion necessarily, we submit, lead to the conclusion that the statute now under consideration providing for an

undertaking securing the release of attached property violates the constitutional provision in question. In that case, the court, by Mr. Justice Bradley, said:

> "The first error assigned is that judgment was entered by the Supreme Court (of the Territory), against the sureties of the appeal bond as well as against the appellants below. This point depends on the question whether the statute of the Territory authorizing such a judgment is a valid one or not. * * * A party who enters his name as surety on an appeal bond does it with a full knowledge of the responsibilities incurred. * * * No fundamental constitutional principle is involved; *no fact is to be ascertained for the purpose of rendering the sureties liable which is not apparent in the record itself;* no object (except mere delay) can be subserved by compelling the appellees to bring a separate action on the appeal bond."

In the case at bar, it is manifest that by the construction given to the statute in question by the lower courts and which will be contended for in this court, facts were inquired into by the trial court for the purpose of rendering the surety liable, which were not apparent in the record itself; and the trial court in this case attempted to find these facts, namely, the value of the attached property, and whether the surety was under an estoppel-involving inquiry as to why no appraisement was made—and coupled its findings with an offer to summon a jury to ascertain and determine the value. If this is a proper construction of the statute, plainly the statute is unconstitutional and void. If it is not a proper construction of the statute, as plainly, the judgment rendered against the plaintiff in error was a void one.

For the reasons above stated it is respectfully submitted

that the judgment of the lower court should be reversed, and the case remanded with instructions to enter a judgment in the case for the plaintiff in error, United Surety Company for its costs.

WADE H. ELLIS,
R. GOLDEN DONALDSON,
CHARLES COWLES TUCKER,
ABNER H. FERGUSON,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 203.

UNITED SURETY COMPANY, A CORPORATION,
Plaintiff in Error,

vs.

AMERICAN FRUIT PRODUCT COMPANY, A CORPORATION,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR ON QUESTION OF JURISDICTION.

Counsel for defendant in error, at the beginning of their brief, raise, for the first time, a question of

jurisdiction, and cite three decisions of this Court in which it has been held that this Court has not jurisdiction to re-examine the final judgments or decrees of the Court of Appeals of the District of Columbia under Paragraph 6 of Section 250 of the Judicial Code, except under certain circumstances. This paragraph applies to cases in which the *construction of a law* of the United States is drawn in question, and the cases relied upon by the defendant in error hold that Paragraph 6 does not apply to laws passed by Congress which are applicable only to the District of Columbia.

The plaintiff in error does not rely upon Paragraph 6 of Section 250 of the Judicial Code, but upon Paragraph 3 of that section, which provides for a review by this Court of the decisions of the Court of Appeals of the District of Columbia

> "In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority."

The contention of the plaintiff in error has been from the beginning that Sections 454 and 455 of the Code of the District of Columbia (which appear in full on pages 30, 31 and 32 of our original brief) are unconstitutional in that they violate the provision against the deprivation of property without due process of law.

This Court has held in the case of *American Security & Trust Co. v. Commissioners of the District of Columbia* (224 U. S., 491), in construing Paragraph 6 of Section 250, that the expression in that paragraph "any law of the United States" means Congressional enactments only which have general application throughout the United States, and not those which affect only the District of Columbia.

But this Court in that case plainly drew a distinction between the expression as used in Paragraph 6 of Section 250, and the same expression as used in Paragraph 3. In this connection the Court said:

> "Of course there is no doubt that the special act of Congress was, in one sense, a law of the United States. It well might be that it would fall within the meaning of the same words in the third clause of the same section, 'cases involving the constitutionality of any law of the United States.' Parsons v. District of Columbia, 170 U. S., 45. But it needs no authority to show that the same phrase may have different meanings in different connections. Some reasons for strict construction apply here."

It will, therefore, be seen that this Court has made the strongest sort of intimation, which it has fortified by the citation of one of its previous decisions, that an appeal or writ of error will lie "in cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States," although the law in question is an act of Congress applicable only to the District of Columbia.

None of the cases cited by the defendant in error apply to the situation which is presented in the case at bar. So far as we have been able to find, this Court has not determined the question of its jurisdiction to review the judgments and decrees of the Court of Appeals of the District of Columbia, when the constitutionality of an act of Congress relating to the District of Columbia is brought in question.

Certainly, every reason of justice supports the contention that it was not the purpose of Congress to oust the jurisdiction of this Court in cases where the constitutionality of acts of Congress are involved, merely because those acts of Congress happen to affect 300,000 citizens of the United States residing in the District of Columbia, and not the remaining citizens of the United States who are non-residents.

It certainly was not the intention of Congress to give the citizens of the several States of the United States a right to have the constitutionality of the laws of those States finally passed upon by this Court, and to deprive the citizens of the District of Columbia of the right to have the constitutionality of the laws under which they live and by which they are governed, determined in the same way.

It is respectfully submitted, therefore, that a citizen of the United States who resides in the District of Columbia is as much entitled to have his constitutional rights safeguarded and protected by this Court as is a citizen of the United States who happens not to be a resident of the District of Columbia but a resident of one of the States.

Counsel for defendant in error in discussing the question of the jurisdiction of this Court to determine this case go far afield, and undertake to discuss the question of whether or not the statute is constitutional. That point is not pertinent to the question of jurisdiction and consequently will not be considered in this brief. It is fully discussed in the principal brief which we have filed upon the merits, and we do not deem it necessary or proper to elaborate further upon it here.

It is, therefore, respectfully submitted that this Court has jurisdiction to hear and determine this case upon its merits, under Paragraph 3, of Section 250 of the Judicial Code of the United States.

WADE H. ELLIS,
R. GOLDEN DONALDSON,
CHARLES COWLES TUCKER,
ABNER H. FERGUSON,
Attorneys for Plaintiff in Error.

17

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 203.

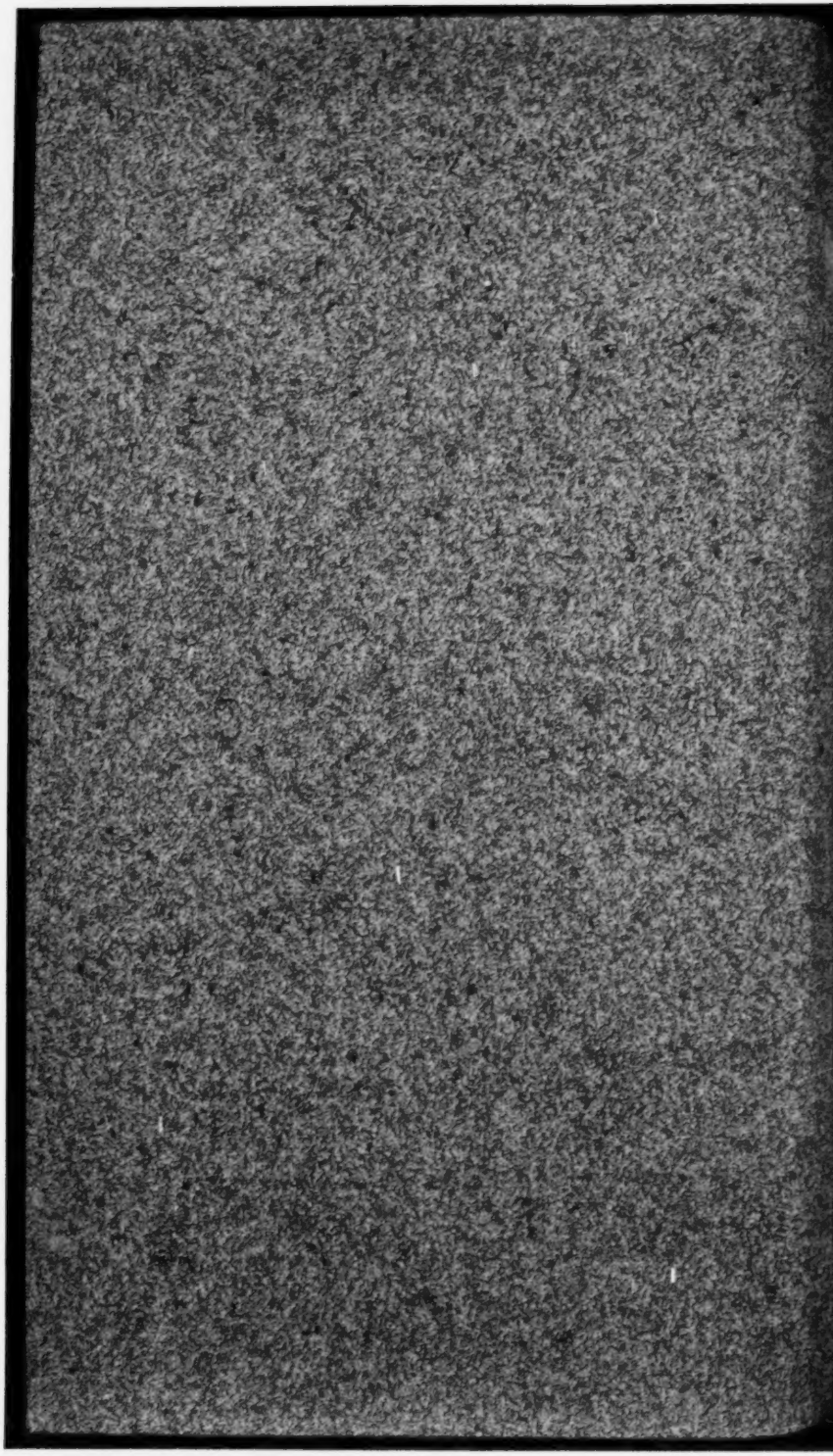
THE UNITED SURETY COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

vs.

AMERICAN FRUIT PRODUCT COMPANY, A CORPORATION, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

GEORGE E. HAMILTON,
JOHN W. YERKES,
JOHN J. HAMILTON,
Attorneys for Defendant in Error.



SUBJECT INDEX.

	Page
Statement of facts	1–10
Suit brought by defendant in error and attachment issued	2
Return to writ of attachment	3
Undertaking given by defendant to release attachment	3
Trial of May 19, 1910, and verdict and judgment	4
Application of plaintiff in error to stay execution and set aside judgment	5
Ruling of trial court on application to set aside judgment and grant new trial	6
Objections of plaintiff in error to second trial	9
Argument	10–58
First Point:	
This court is without jurisdiction under Sec. 250 of Judicial Code to determine this case on the merits	10
Second Point:	
The plaintiff in error, surety on the undertaking in suit, was represented in law by its principal, and was bound by its action in the course of the litigation	16
Third Point:	
No appraisement under direction of the Marshal was required by statute, and if made would not be binding on the surety, and was waived	27
Fourth Point:	
The judgment of May 25, 1910, was not a personal judgment against the principal defendant, but was a joint judgment against said defendant and its surety in conformity with the statute, and the record presents no question of election to accept a personal judgment against the principal defendant	37
Fifth Point:	
The ruling of the trial court that order of October 21, 1910, setting aside the verdict and judgment as to plaintiff in error operated in law to set aside said verdict and judgment as to the defendant as well as the surety, was correct and he had the right to order a trial de novo	42
Sixth Point:	
The trial court did not commit error in admitting evidence of Deputy Marshal Cusick, and if erroneous it was immaterial and harmless	53
There is no constitutional question raised in this case	54

AUTHORITIES CITED.

	Page
Atlantic Trust, &c., Co. vs. Laurinburg, 163 Fed., 695	25
Am. & Eng. Ency. Pleading & Practice, vol. 15, p. 214	39
Am. Security & Trust Co. vs. D. C., 224 U. S., 491	11
Andres vs. Schleuter, 140 Iowa, 389	19
Ash vs. McCabe, 21 Ohio State, 181	52
Barry vs. Frayser, 66 Tenn. Reps., 206	36
Bartle vs. Coleman, 6 Wheat., 475	46
Beall vs. New Mexico, 16 Wall., 535	15, 23, 56, 58
Bierce, Ltd., vs. Waterhouse, 219 U. S., 320	21
Black on Judgments, §§ 211 and 315	53
Blake vs. McNamara, 9 Misc. Reps. (N. Y.), 212	35
Brandt on Suretyship & Guaranty, vol. 2, § 782	56, 57
Brown vs. Hamil, 76 Ala., 506	35
Buffam vs. Ramsdell, 55 Maine, 252	49
Cheek vs. Pugh, 19 Ark., 574	51
Claflin vs. Dunne, 129 Ill., 241	47
Clark vs. Dreyer, 9 Colo. App., 453	36
Coleman vs. Bean, 32 How. Pr. R. (N. Y.), 370	35
Council vs. Averett, 90 N. C., 168	36
Council Bluffs Bank vs. Griswold, 50 Neb., 753	51
Douglass vs. Massie, 16 Ohio, 271	52
Finley vs. Southern Ry. Co., 64 S. E. Rep., 304	48
Fletcher vs. Menkin, 37 Ark., 206	22
Forbes vs. Navara, 63 Miss., 1	40
Glenn vs. Porter, 68 Ark., 320	22
Gray vs. Stuart, 33 Gratt. (Va.), 358	52
Greenlaw vs. Logan, 70 Tenn., 185	36
Guaranty Co. vs. Pressed Brick Co., 191 U. S., 416	25
Hall vs. Williams, 6 Peck., 232	45
Hanley vs. Donoghue, 59 Md., 239	44
Hauser vs. Ryan, 73 N. J. L., 274	36
Holton vs. Towner, 81 Mo., 360	50
Hopkins vs. Orr, 124 U. S., 510	14, 57
Hughes vs. Lindsay, 10 Ark., 555	45
Jackson vs. Hulse, 6 Mackey (D. C.), 548	46
Jameson vs. Pomeroy, 9 Pa. St., 230	52
Jansen vs. Varnum, 89 Ill., 102	48
Johnson vs. Chicago, &c., P. Elevator Co., 119 U. S., 388	14, 23, 26, 57
Kitchens vs. Hutchins, 44 Ga., 620	48
Long vs. Garrett, 45 Texas, 400	45
McArthur vs. Oliver, 53 Mich., 299	45

Page

McGowan vs. Parish, 228 U. S., 312 11
McRae vs. Austin, 9 La. Ann., 361 36
Martin vs. Gilbert, 119 N. Y., 298 35
Meyer vs. Kuhn, 65 Fed., 705 46
Minnesota vs. Hitchcock, 185 U. S., 373 10
Moffitt vs. Garrett, 100 Pac. (Okla.), 533 20
Moore vs. Huntington, 17 Wall., 417 ..... 14, 22, 57
Murphy vs. Orr, 32 Ill., 489 51
Neenan vs. City of St. Joseph, 126 Mo., 89 50
O'Donnell vs. Kavanaugh, 158 Ill. App., 603 48
Rangely vs. Webster, 11 N. H., 306 49
Richards vs. Finney, 12 Johns., 434 45
Samonski vs. Chicago Co., 156 Ill. App., 300 48
Sheldon vs. Quinlen, 5 Hill (N. Y.), 441 49
Sturgis vs. Miller, 79 Neb., 404 52
Tedlie vs. Dill, 3 Kelly (Ga.), 104 48
Tenney vs. Taylor, 1 App. D. C., 223 55
Trousdale vs. Donnell, 4 Humphreys (Tenn.), 273 48
U. S. to use D. C. vs. Bayly, 39 App. D. C., 105 25
Van Rensselaer vs. Whiting, 12 Mich., 449 44
Washington, &c., Ry. Co. vs. Downey, No. 144, October Term, 1914 11
Whelan vs. McCulloch, 4 App. D. C., 58 22
Williams vs. Chalfante, 82 Ill., 218 47
Wright vs. Andrews, 130 Mass., 149 45

STATUTES.

Sections of Code, D. C., 454, 455, 460, 464, 466, 468, 479 59–62
Indiana Code, § 168 41
Judicial Code, § 250 11

IN THE

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OCTOBER TERM, 1914.

No. 203.

THE UNITED SURETY COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

vs.

AMERICAN FRUIT PRODUCT COMPANY, A CORPORATION, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

The brief for the plaintiff in error does not set forth certain of the facts in this case, and shown by the record, which are deemed essential in order to give the court a full and correct view of this litigation and of the position and rights of the parties involved. For this reason, we have deemed it prudent, if not necessary, to give a concise statement of facts and to refer to certain matters which were not touched on by plaintiff in error.

The American Fruit Product Company was engaged in the manufacture of what is known as fortified juice, apple cider and cider vinegar, and had certain contracts with the defendant Semmes-Kelly Company, wholesale grocer, a corporation, doing business in this city, to manufacture, sell and deliver to said grocer a large number of barrels of said product, said delivery being f. o. b. at the mills of the Fruit Product Company at Rochester, N. Y., and other nearby points.

Deliveries were made thereafter under said contracts, but the payment of the amount due thereon not being made, the Fruit Product Company began suit in the Supreme Court of the District of Columbia on April 22, 1908, against the Semmes-Kelly Company to recover the balance then claimed to be due, amounting to $10,596.45, with interest.

At the time said suit was filed, an attachment was also issued under authority of the attachment sections of the Code, and based on the ground that the defendant Semmes-Kelly Company was a non-resident of the District of Columbia, the same being a Virginia corporation, and the plaintiff gave the usual attachment bond in the sum of $22,000, to cover any loss which the defendant might sustain by reason of the wrongful suing out of the attachment.

Said writ of attachment, together with a summons to the defendant to answer said suit, were both immediately placed in the hands of the marshal, and were served by that official on the same day (Rec., p. 6).

Under the writ of attachment the marshal took possession of the stores of the defendant at 614-616 Pennsylvania avenue, and the contents thereof, but did not remove said contents because he was notified by said defendant and its attorney, both before said writ of attachment was issued and subsequent thereto, not to remove the property from the premises because the defendant desired and intended to give bond for the release of said property, as authorized by section 455 of the Code (Rec., pp. 39, 40).

It further appears that the defendant had been expecting

the plaintiff to file suit and issue attachment, and had made arrangements with the plaintiff in error to act as surety on the forthcoming bond to be given the marshal for the release of its property from the attachment, at least two days before the attachment was actually issued (Rec., p. 44), and they had notified the marshal that the writ would probably be placed in his hands for execution, and when it did come to him there would be no occasion to levy the attachment in the sense of disturbing the goods, as the forthcoming bond would be promptly given to release them (Rec., p. 39).

Several hours after the marshal had actually taken possession of the stores of the defendant, and the goods therein contained, and had actually summoned three persons to make an appraisement of said goods, the defendant Semmes-Kelly Company, and its attorneys, tendered to the marshal an undertaking on the form suggested by section 454 of the Code, duly signed by the defendant and the plaintiff in error, with the request that the same be accepted in the place of the levy and appraisement of the property by the marshal (Rec., p. 40).

The marshal having been previously advised by the attorney for the defendant and by the president of the defendant company that the goods attached were worth more than $20,000 (Rec., pp. 39, 41 and 47), which information was confirmed by the deputy marshal who was in possession of the stores (Rec., p. 38), received the undertaking and endorsed upon the schedule of levy attached to said writ of attachment the following statement:

> "*Schedule of Levy under Writ of Attachment.* Large stock of merchandise, groceries, canned goods, etc., located at store—premises No. 614-616 Penn. Ave.—valued at $20,000" (Rec., p. 6).

It further appears that said endorsement was made on the evening of April 22, 1908; that said undertaking was tendered to the marshal late in the afternoon of April 22, 1908, but that it was not finally accepted until the next day because

the marshal desired to have the plaintiff's attorney approve the same. This approval was obtained on April 23, 1908 (Rec., pp. 41 and 49).

After said undertaking was given to the marshal, a copy of which appears on page 6 of the record, the deputy was withdrawn from the stores of the defendant, and said undertaking, together with the marshal's return, with endorsement thereon "Released on bond April 23, 1908," was filed in the clerk's office (Rec., pp. 6 and 7).

Thereafter, and on May 19, 1908, the defendant Semmes-Kelly Company filed seven pleas to the declaration of plaintiff, five of which were pleas of set-off in amounts aggregating $5,754.30, leaving a balance admittedly due the plaintiff of $4,842.15 (Rec., p. 7). Issue was joined on these pleas and the case calendared for trial.

After the attachment was released by the giving of the undertaking above referred to, the defendant Semmes-Kelly Company, continued doing business until June 23, 1909, on which date it was adjudged a bankrupt, and its affairs were placed in the hands of a trustee, who thereafter closed out said business entirely (Rec., p. 16).

In April, 1910, shortly before this case was about to be reached on the trial calendar, counsel for the plaintiff Fruit Product Company, gave notice to counsel for defendant, Semmes-Kelly Company, of an application to be made to the court to specially set the case, on the ground of non-residence of some of plaintiff's witneses, and on the hearing of said application the case was specially set for trial on May 19, 1910. On said date the plaintiff and the defendant each appearing by counsel, a trial by jury was had, resulting in a verdict for the plaintiff in the sum of $8,748.29, with interest (Rec., p. 14).

No motion for new trial having been filed, judgment was subsequently, on May 25, 1910, entered upon said verdict in accordance with the rules of court, said judgment being a joint judgment against the defendant and the United Surety Company, its surety, in the sum of $20,000, the value of the

property attached, but to be released upon the payment by the defendant, or its surety, of the amount of said verdict, with interest and costs (Rec., p. 15).

The defendant, Semmes-Kelly Company, being in bankruptcy, various efforts were made by the plaintiff in the case to collect the amount of said judgment from the surety company, including the issuance of a *fieri facias* on August 16, 1910, and a writ of garnishment issued on August 30, 1910, which garnishment was served upon the agents of the surety company, attaching certain credits of said surety company in their hands (Rec., p. 15).

Thereafter, to wit, on September 7, 1910, plaintiff in error filed a motion to stay said execution and garnishment, and to vacate the same and grant a trial on the merits, for the reasons set forth in said application (Rec., p. 15), which were that the cause had been advanced for trial without notice or consent of the surety company; that no legal evidence was introduced at the trial to prove the claim of plaintiff against the defendant, and that said surety company had not been given an opportunity to defend said cause, and said judgment was obtained without a trial of the case upon its merits. This application to set aside the judgment was supported by an affidavit of Charles W. Semmes, president of the Semmes-Kelly Company, to the effect that the plaintiff was not entitled to the full amount of said judgment because the defendant had valid set-offs thereto in the sum of $5,754.30, as shown by the pleas of the defendant, and affiant further stated:

> "That if said case should be tried upon its merits, he is prepared to produce competent proof to prove his statements * * *. That if the judgment in this case is set aside, he will lend his assistance to the United Surety Company in their defense of the suit."

Said application to set aside the judgment was also supported by the affidavit of R. Golden Donaldson, attorney in fact for said surety comapny, which alleged, among other

things, that the trial of said case was had on May 19, 1910, without the consent of the defendant or of said surety company, and that a consent verdict had been taken in favor of the plaintiff, and judgment entered thereon, and that the first notice said parties had of said judgment was when affiant examined the docket in the clerk's office a short time after the entry of said judgment; that he had requested counsel for plaintiff

> "to have said judgment set aside and the case tried upon its merits as this affiant believes said surety company is entitled under the law to have done, but said counsel have declined so to do, and have issued execution upon said judgment and attached the credits of the United Surety Company in the hands of its local agents, said Ricketts and Eynon, and threatened to your affiant to issue other executions in an endeavor to satisfy said judgment obtained against the surety company so as aforesaid."
>
> "Your affiant further states that there is a good defense to a large portion of said claim, to wit, the sum of $5,754.30, *and that if the said judgment is set aside and the case ordered to be tried upon its merits, the said United Surety Company is prepared to defend said suit upon its merits,* and to produce competent evidence to prove that the said claim of the plaintiff should be reduced to the extent of said sum of $5,754.30, as said defense is more in detail set out in the pleas and affidavit of defense filed in this case" (Rec., pp. 18 and 19).

Although the material statements contained in said affidavits were contradicted by affidavits filed on behalf of the plaintiff, the defendant in error, here, the trial court, after holding the matter under consideration, filed a written opinion, to be found on page 26 of the record, in which he seems to have been of the opinion that the verdict rendered in the case should not have been taken without notice to the surety company; that it must have been a consent verdict, because of the allowance of interest from a date not named in the decla-

ration, and that the judgment as entered was not in form, in accordance with the various provisions of the Code. The court further held that said judgment

> "should be set aside and a trial had on the merits, and the said defendant's motion will therefore be granted, unless the plaintiff shall, within ten days from the date this opinion is filed, enter a remittitur as to all its said judgment and interest in excess of $4,842.15, with interest thereon from February 1, 1908, and costs" (Rec., p. 28).

The plaintiff having declined to enter said remittitur, the court on October 21, 1910, ordered

> "that the verdict rendered herein May 19, 1910, and the judgment thereon entered May 25, 1910, be and they are hereby set aside, vacated and for nothing held as against said United Surety Company,"

and it was further ordered

> "that this case be and the same is hereby ordered on the present trial calendar at the foot thereof" (Rec., p. 29).

Reference has been made somewhat at length to the application of the plaintiff in error to have the judgment of May 25, 1910, set aside in order to show that the chief complaint of plaintiff in error at that time was that it had been deprived of a trial of the case on the merits, and that all it desired was to be given an opportunity to present the meritorious defense of the defendant, at least to the extent of the pleas of set-off; and the trial court evidently took that view because in his opinion he held that the judgment should be set aside and a trial had on the merits, unless the plaintiff would agree to enter a remittitur in the exact amount claimed in the pleas of set-off.

It is not our intention to discuss here the action of the trial court in setting aside the verdict and judgment and granting a new trial, but we do call the attention of the court to the

fact that under the provisions of the Code the surety on an undertaking like the one in suit becomes virtually a party to the suit in which such undertaking is filed, and under section 460 of the Code he may enter his appearance and defend the case if he so desires. But even if this were not a correct statement of the law, such a surety is, by the great weight of authority, held to be represented in the proceeding by his principal, and is bound even without notice by any judgment that may be entered against his principal therein; and the record shows that the defendant regularly appeared in the case, file dvarious pleas to the declaration, on which issue was joined, had notice of the application for setting the case for trial, and that both its attorney of record and the attorney for its trustee in bankruptcy were present when the trial was had and verdict rendered (Rec., p. 21). We believe that the trial court was impressed with the contention that the surety company should be given an opportunity to maintain the set-offs claimed by the defendant's pleas, if it could do so, and that the court therefore intended to order that the whole judgment be set aside and the case be placed again on the trial calendar for trial *de novo,* but by inadvertence or mistake, we think, in the entry of the order the words "and the defendant" were omitted at the end of the first paragraph of the order, so that it should have read "said verdict and judgment are hereby set aside, vacated and for nothing held as to said United Surety Company and the defendant" (Rec., p. 29). This inadvertence or mistake is apparent because the court ordered "that the verdict rendered herein May 19, 1910, and the judgment thereon entered May 25, 1910, be and they are hereby set aside and for nothing held as against said United Surety Company, * * *"

There was no verdict, and could be no verdict against the surety company, and the fact that the court included the verdict in his order indicates, it seems to us, that he failed by inadvertence or mistake to write in the words "and the defendant" after the words "Surety Company" at the end of the first clause of the order. Furthermore, the final clause

of the order indicates this because he directs that the case be ordered on the trial calendar for retrial, without anything to indicate that such retrial should include anything more than a trial on the merits of the issues joined between the plaintiff and the defendant Semmes-Kelly Company.

When the case was called for trial a second time, the plaintiff was met by various objections on behalf of the surety company to the swearing of a jury to try the case (Rec., p. 29), thus presenting the peculiar spectacle of a defendant objecting to a trial on the merits because at a former term the court had granted its prayer in setting aside a judgment against it for the very purpose of permitting it to defend on the merits—in other words, because the court, at its request and as a matter of grace, had granted its application, but by inadvertence or mistake had failed to set aside the whole judgment, the court was now powerless to proceed further, and the surety company should be allowed to escape all liability to plaintiff, who was in no way responsible for the condition of the record.

The taking of such a position, it seems to us, is not calculated to recommend the contentions of the plaintiff in error to this court, or to create a desire on the part of the court to search out grounds upon which to sustain the purely technical objections raised by plaintiff in error against the judgment appealed from after a fair and impartial trial of the matters of difference between the plaintiff and the defendant and the defendant's surety.

The case came on for trial a second time on May 6, 1912 (Rec., p. 30), and notwithstanding the fact that the case was bitterly contested by the plaintiff in error, with the assistance of the officers and agents of the defendant Semmes-Kelly Company, no evidence was produced tending to support the pleas of set-off beyond the sum of $4,310.12 as against the sum of $5,754.30 claimed in the pleas (Rec., pp. 50, 51), and the jury did not consider the testimony offered sufficiently strong to establish the claim of the defendant in any particular, and rendered a verdict for the plaintiff for $9,937.20, or

$1,188.91 more than the first judgment entered in the case (Rec., p. 31).

Before entering judgment on this verdict the court offered to permit plaintiff in error to introduce other evidence as to the value of the goods levied upon by the marshal if it so desired, or if so advised to submit the question of the value of the goods levied upon to a jury to be summoned and selected for that purpose, both of which offers were declined by plaintiff in error, and thereupon the judgment appealed from was entered (Rec., pp. 33, 34). This judgment was affirmed by the Court of Appeals (Rec., p. 60), 40 App. D. C., 239.

ARGUMENT.

I.

Has the Supreme Court Jurisdiction to Hear and Determine This Cause under the Provisions of Section 250 of the Judicial Code?

At the threshold of this case is presented the question as to whether or not this court has jurisdiction to hear and determine this case on the merits. Under the law the decision of the Court of Appeals is final unless the case comes within the provisions of section 250 of the Judicial Code, permitting a review in certain cases, and this question will have to be determined by the court before passing to the merits, even though no motion to dismiss for want of jurisdiction has been interposed by the defendant in error.

Minnesota *vs.* Hitchcock, 185 U. S., 373.

Application was made by plaintiff in error to the Court of Appeals for the allowance of a writ of error, based upon the provisions of section 250 of the Judicial Code, passed March 3, 1911, 36 Stats., 1087, but in denying said application the court said:

> "A mere reference to the record and opinion in this case will disclose that the question raised was the constitutionality of a law of the District of Columbia, and not a general law of the United States. The right of appeal is confined to cases in which the constitutionality of general laws of the United States is involved and not acts of Congress local to the District of Columbia" (Rec., p. 66).

Said application, however, was subsequently granted by the Chief Justice of the United States (Rec., p. 69).

This court has held that section 250 of the Judicial Code should be strictly construed, as the intent of Congress was to relieve the court from indiscriminate appeals where the amount involved exceeded $5,000, and it has also been held several times that the jurisdiction of this court to re-examine final judgments or decrees of the Court of Appeals of the District of Columbia under section 250 of the Judicial Code, in cases in which the construction of a law of the United States is drawn in question, does not extend to laws of the United States local in their application to the District of Columbia.

> Am. Security & Trust Co. *vs.* D. C., 224 U. S., 491.
> McGowan *vs.* Parish, 228 U. S., 312.
> Washington, &c., Ry. Co. *vs.* Downey, No. 144, October Term, 1914.

It will no doubt be argued by plaintiff in error that the decisions of this court above referred to only involve a construction of paragraph six of section 250 of the Judicial Code, and that its right of appeal is based upon the broader provisions of paragraph three, which provides for appeals

> "in cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority."

The claim is advanced that because sections 454 and 455 of the Code of the District of Columbia permit of the entry of a judgment against the surety named in the undertaking given to release an attachment without his day in court, that such proceeding involves the taking of private property without due process of law, and violates the rights guaranteed to a citizen by the Constitution of the United States. In this way it is argued that this case involves the application of the Constitution of the United States to the rights of the plaintiff in error in such manner as to entitle it to bring the case to this court for final determination. We are not convinced that this argument is sound, or that this case in any way involves the application of the provision of the Constitution referred to. We cannot see that any constitutional right which the surety had is taken away from it by sections 454 and 455 of our Code, except those which it directly contracted to waive in signing the undertaking in question. By the very terms of the undertaking entered into by the plaintiff in error, for a consideration, paid to it by the defendant in the case, it submitted itself to the jurisdiction of the court, and contracted and agreed that it would abide by and perform any judgment that the court might enter in the premises in relation to said property. Section 455 provides that in case the property is returned to the defendant upon his executing the undertaking called for in section 454, and judgment in the action is eventually rendered in favor of the plaintiff, that it should be a joint judgment against both the defendant and his surety or sureties in said undertaking for the appraised value of the property. The statute nowhere provides that an appraisement shall be taken where property is attached in the hands of the defendant, or the manner and by whom the value of the attached property shall be ascertained.

In the trial of this case it was proved by a witness produced by the plaintiff in error itself that the property levied on by the marshal was worth $20,000; and before the entry of judgment against the plaintiff in error, the trial court offered

to permit further testimony on the subject of the value of the property attached, even to the extent of impaneling a jury to inquire into that subject, both of which offers were declined by plaintiff in error, and the judgment found on page 33 of the record was entered. That judgment, we submit, followed every requirement of the statute, and was in part as follows:

> "It further appears to the court from the uncontradicted testimony of Charles W. Semmes, president of the defendant company, who signed the application to said surety company for said bond, and who executed and delivered to said surety company an indemnifying bond in this matter, that the stock of goods levied upon and attached by the marshal was worth more than $20,000 at the time of the levy, and this court having offered to permit said surety company to introduce other evidence as to the value of the stock of goods so levied upon by the marshal, if it so desired, or if so advised to submit the question of the value of the goods levied upon to a jury to be summoned and selected for that purpose, and said surety company, having declined to take advantage of either of said offers, the court is of the opinion, and so finds, that under the evidence submitted, including the record in this case, the plaintiff has established its right to a joint judgment in this action against the defendant and the United Surety Company, and therefore it is now ordered and adjudged that the plaintiff, American Fruit Product Company, a corporation, recover of the defendant, Semmes-Kelly Company, a corporation, and the United Surety Company, a corporation, the sum of $9,937.20, found due by the said defendant to said plaintiff by a verdict of a jury duly rendered herein, and the costs of this suit and interest on said amount of $9,937.20 from this date until paid, at the rate of six per cent per annum, and for which execution shall be had and may be issued, but this judgment to be released and held for naught as to said United Surety Company upon the delivery by it or by the defendant to the United States marshal in this district of the property levied upon, if said delivery be made within ten days from the date of the entry of this judgment; otherwise said judgment to be and remain in full force and effect" (Rec., p. 34).

An attachment or appeal bond is a contract; and where the surety by express agreement in the bond agrees to submit to the jurisdiction of the court and abide by and perform the judgment of the court, is equivalent to a waiver of process and submission to the jurisdiction of the court. Where the statute provides for summary entry of judgment against the surety, and by the terms of the bond he has submitted himself to the jurisdiction of the court for that purpose, no fact remains to be ascertained to render the surety liable, and a separate action on the bond is unnecessary.

Moore *vs.* Huntington, 17 Wall., 417.
Johnson *vs.* Chicago, &c., P. Elevator Co., 119 U. S., 388.
Hopkins *vs.* Orr, 124 U. S., 510.

Plaintiff in error made its contract with reference to the provisions of the law then in force, and it had knowledge of the fact that the law did not require an official appraisement in cases like the one at bar. Indeed, it would not have been bound by an appraisement caused to be made by the marshal, any more than by one made by the merest stranger, because the marshal had no authority in law to cause such appraisement to be made. The sole object of an appraisement is to ascertain the value of the property levied on, and in the absence of statutory requirement for an official appraisement the surety must be held to have contracted to submit to an appraisement or ascertainment of the value of the property levied on by some method recognized as proper by courts of justice.

If by the undertaking entered into by the plaintiff in error, it contracted, for a consideration, to waive process by submitting itself to the jurisdiction of the court, and agreed that any judgment entered against the defendant might also be entered against it, whether that judgment be for the return of the property levied on or purely a money judgment for the appraised value of the property, to be ascertained in some

manner authorized by the court, or a judgment only for the amount of the plaintiff's verdict, where, as in the case at bar, the value of the property levied on was far in excess of the verdict, we are unable to see how it has been deprived of any of its constitutional rights, or how any fundamental constitutional principle is involved.

In the case of Beall *vs.* New Mexico, 16 Wall., 535, the court had under consideration the validity of a judgment upon an appeal bond entered under a statute, which provided that in case of appeal in civil suits, if the judgment by the appellate court be against the appellant, it shall be rendered against him and his surety on the appeal bond. Sustaining the validity of the judgment this court said:

> "The first error assigned is that judgment was entered by the Supreme Court against the sureties on the appeal bond as well as against the appellants below. This point depends on the question whether the statute of the territory authorizing such a judgment is a valid one or not. As the legislative power of the territory, by the organic act, extends to all rightful subjects of legislation consistent with the Constitution of the United States, it would seem to extend to such a case as this. A party who enters his name as surety on an appeal bond does it with a full knowledge of the responsibilities incurred. In view of the law relating to the subject it is equivalent to a consent that judgment shall be entered up against him if the appellant fails to sustain his appeal. If judgment may thus be entered on a recognizance, and against stipulators in admiralty, we see no reason in the nature of things, or in the provisions of the Constitution why this effect should not be given to appeal bonds in other actions, if the legislature deems it expedient. No fundamental constitutional principle is involved; no fact is to be ascertained for the purpose of rendering the sureties liable, which is not apparent in the record itself; no object (except mere delay) can be subserved by compelling the appellees to bring a separate action on the appeal bond."

In whatever light we may view the sections of the Code now under consideration, the fact must not be lost sight of that in this case the plaintiff in error, notwithstanding the agreement made by it in signing the undertaking, was afforded every opportunity to defend the suit. The first judgment entered in May, 1910, was set aside on its application, based upon the proposition that the verdict had been rendered and judgment entered against it without notice and without an opportunity to it to defend the case upon its merits. When the case was reached for trial a second time, it was represented in court by counsel and witnesses, and the case vigorously defended from beginning to end. Before the judgment was entered, the court again offered to give it the opportunity to produce testimony or to try out the question of the value of the property levied on and released by its undertaking. We fail to see wherein the plaintiff in error was deprived of a single constitutional right; and if we are correct in this statement, then we submit that the case presents no question of the "application of the Constitution of the United States" within the meaning of clause 3 of section 250 of the Judicial Code, and that this cause should be dismissed for want of jurisdiction.

Austin vs.The Aldermen, 7 Wall.,694.
Supervisors vs.Stanley,105 U.S.,305.
Turpin vs. Lemon, 187 U.S., 51.
Tyler vs.Judges,&c.,179 U.S.,405.

The Surety on the Undertaking in Suit Was, in Law, Represented by Its Principal, the Defendant in the Case, and Was Bound by Whatever Was Done by Its Principal in the Course of the Litigation, in the Absence of Fraud, Even Without Notice to It.

There is no charge made anywhere in the record that the defendant committed fraud of any character upon the surety company by any of its acts in the course of this litigation; nor is there any charge made of collusion between the plaintiff and the defendant and the United States marshal for the

purpose of injuring the surety company or increasing in any way its liability on said undertaking, or for the purpose of depriving it of any of its rights under its suretyship. No claim is made that the surety company was injured by any failure of the marshal to have the property levied upon, appraised, because its own witness, Charles W. Semmes, president of the Semmes-Kelly Company, while testifying in its behalf, states:

> "That the stock of goods levied upon was at the time of the levy worth much more than $20,000.00" (Rec., p. 50).

It admits, both by the record and by the brief filed on its behalf by counsel, that the giving of the undertaking on which it acted as surety, served to release the property attached to the defendant, who, of course, could and would dispose of the same in the course of its business, long before the case could be reached for trial, and if any recovery should be had by the plaintiff, it must, in the nature of things, be in effect a money judgment against the defendant and its surety.

Yet, it claims that it has been released from its obligation on the undertaking because there was no appraisement, a thing which was not required by the statute, and the failure to do which in no way injured it.

Not a single meritorious defense was made at the trial by plaintiff in error, except the partial one of set-off, which was disallowed by the jury; and not an error is assigned on this appeal which impeaches, in the slightest degree, the justness of the judgment recovered by defendant in error.

With its assistance the defendant was able to remove from the possession of the marshal property which would have been forthcoming, and undoubtedly sufficient to satisfy the claim of the defendant in error against the Semmes-Kelly Company; and this satisfaction would have been obtained five years ago but for the giving of the undertaking in suit.

It was not compelled to go upon this undertaking. It considered for two days the nature of the risk to be assumed by it (Rec., p. 44); and it took back from the defendant such counter-security as it deemed necessary for its full protection (Rec., p. 45). It not only had its day in court in defense of this suit, but it had two days in court, as shown by the record, and yet it is now asking this court to hold that the judgment entered against it is void because there was no appraisement of property levied on by the marshal. If this objection is well founded, then the plaintiff in error, with the assistance of the defendant, has, under the guise of law, perpetrated a gross fraud upon the defendant in error by rendering its just claim wholly worthless and uncollectible. At this point we desire to call attention to some decisions of the courts upon the rights, duties and liabilities of corporate sureties on obligations given by defendants in legal proceedings in order to clear up some of the objections which have been raised by the plaintiff in error.

The attachment sections of the Code mention the giving of an "undertaking," as distinguished from a bond, and as that undertaking is defined by the law itself, we give below the section of the Code on the subject, in order that the court may conveniently see what manner of contract a surety enters into when he signs such an undertaking:

> "SEC. 479. UNDERTAKINGS.—An undertaking shall be understood to signify an agreement entered into by a party to a suit or proceeding, with or without sureties, upon which a judgment or decree may be rendered in the same suit or proceeding against said party and his sureties, if any, the said party and sureties submitting themselves to the jurisdiction of the court for that purpose."

For convenient reference, we are including in an appendix the various sections of the Code bearing upon the levying of attachments and the release of property attached by the giving of an undertaking and the subsequent trial and

judgment in such cases, including therein, however, only such sections as are thought to have any bearing upon this case.

It is our contention that the appellant signed the undertaking in suit having in view the provisions of the law on the subject, which provisions of law entered into and formed a part of the surety's contract and undertaking, and the surety is now estopped to dispute the obligations imposed by the statute.

The case of Andres *vs.* Schleuter, 140 Iowa, 389, was a suit on an account, begun by attachment, and the defendant failed to appear and defend, and judgment was entered against him and the Illinois Surety Company, his surety on the bond given to discharge the attachment. There was an appeal from the refusal of the court to set aside the judgment, and the court said:

> "In the first place, the Illinois Surety Company was not surety for Schleuter with reference to the original indebtedness, and much that is said in the printed argument, and also in the oral argument, by counsel as to the rights of sureties, has no application to the liability of the surety company on a bond given to discharge the attachment. * * * These provisions have reference to the relation of principal and surety to the original indebtedness, and have no application under Code 3907, 3908, providing for the entry of judgment against the surety on the bond to discharge the attachment.
>
> "The contention that the court was without jurisdiction to enter judgment against the Illinois Surety Company without notice to it and an opportunity to present any grounds of release of liability which it may have had, may be answered in the same way. The bond was conditioned as provided by the statute on the performance and satisfaction by the principal of any judgment which might be rendered against him in the action. * * * As our statute does provide for such a bond as that in question, in pursuance of which judgment is to be entered without further proceedings, there can be no question, we think, as to

> the validity of such judgment as against any defense which might have been interposed by the original debtor prior to the rendition of the judgment against him. * * * If the judgment was procured by fraud or collusion, or was void for want of jurisdiction over the principal defendant, of course the surety in the bond could resist the enforcement of the judgment as against him. *But this surety agreed for a money consideration to satisfy any judgment that should be rendered against its principal, and thereby secured the relinquishment by plaintiffs of their remedy by attachment, and cannot, therefore, be heard to question the correctness of the judgment entered.* This surety accepted as one of its risks the failure of the principal defendant to successfully interpose any defense which he had to the plaintiff's claim prior to a rendition of judgment against him, and is concluded by the judgment as rendered."

In the case of Moffitt *vs.* Garrett, 100 Pac. (Okla.), 533, suit was brought against principal and sureties on a bond given to secure possession of property attached, the bond being conditioned for the performance of the judgment of the court and to pay the amount of any judgment rendered against them in the action. The court said:

> "The sole question involved in this record is whether or not the undertakers on such bond are bound to perform the judgment of the court by paying such judgment, regardless of whether or not the attachment was rightfully brought, or the property seized belonged to the defendant in the attachment writ. * * * Upon the rendition of the judgment no order was made to sell the attached property, and this shows that the justice considered the undertaking conditioned for the payment of the judgment or its value in money on the day of sale. * *
>
> "New York, Illinois, Wisconsin, Missouri, Michigan, Minnesota, Texas, Arkansas, Washington, Rhode Island, California, Oregon, North Dakota, and South Dakota have, or have had, statutes containing substantially the same provisions as are contained in Sections 4374 and 4404.

"The courts in these States have held that the execution of a bond under and in accordance with these statutes, estops the defendant from controverting the attachment, and renders the obligors in the bond absolutely liable for the amount of any judgment the plaintiff recovers in the action, without reference to the question whether the attachment was rightfully or wrongfully sued out. * * * It is the theory of a great many of the adjudicated cases under such statutory provisions that the bond becomes an unconditional contract or promise to pay whatever judgment may be rendered against the defendant upon the merits of the case, and does not depend upon the regularity of the attachment branch of the case; that the consideration for the promise to pay the judgment is the immediate release of the attached property; that the giving of the bond effects the immediate discharge of the attachment and the release of the property, and the bond then becomes security for any judgment that shall be rendered against the defendant.

"Judgment for plaintiff affirmed."

In the case of William W. Bierce, Ltd., *vs.* Waterhouse, 219 U. S., 320, action was brought for breach of the condition of a redelivery or return bond executed by the defendant in a replevin suit. After the forthcoming bond was given, the plaintiff amended his complaint by increasing the value of the property taken, and the trial resulted in a judgment for the plaintiff for the return of the property and damages for its detention, or in default of return that the defendant pay the value of the property as fixed by the amended complaint. In defending on the return bond, the surety set up several grounds of release, among them being the increased risk resulting from plaintiff's amending his petition and increasing the value of the property replevied. These objections, however, were decided against the surety, and the case coming on appeal to the Supreme Court, this court said:

"This brings us to the proposition as to whether the question thus once litigated and decided in a replevin suit, is open to re-litigation by the surety when sued

upon the return bond. The surety on such a bond given in the course of a judicial proceeding, is represented in that proceeding by his principal. That the court possessed the power of allowing an amendment which introduced no new cause of action is plain. The surety became such in contemplation of the possible exercise of that power. The penalty of the bond was not exceeded, and an increase in the *ad damnum* did not introduce a new cause of action. Townsend Nat'l Bank *vs.* Jones, 151 Mass., 454. By the execution of the bond, the surety consented to become responsible to the amount of the penal sum therein named. * * *

"One who becomes a surety for the performance of a judgment of a court in a pending case, is represented by his principal and is bound by the judgment against his principal within the limits of his obligation. Washington Ice Co. *vs.* Webster, 125 U. S., 426; Stovall *vs.* Banks, 10 Wall., 583."

"A decree against a principal, ascertaining and fixing his liability, binds the surety though not a party to the suit."

Whelan *vs.* McCulloch, 4 App. D. C., 58.

"By execution of the delivery bond provided for (Gantt's Dig., par. 406), the sureties become parties to the action and summary judgment may be entered against them in the action without service of process or notice."

Fletcher *vs.* Menkin, 37 Ark., 206.

"Notice to the surety is not necessary unless the statute expressly provides for it."

Glenn *vs.* Porter, 68 Ark., 320.

In the case of Moore *vs.* Huntington, 17 Wall., 417, suit was filed by Mrs. Huntington against Moore, and others, in the district court. Judgment was recovered by the plaintiff, and the defendants took an appeal, and the court, after reducing the judgment to $72,920.75, affirmed the decree of the district court, and adjudged that the plaintiffs should have judgment against the sureties on the bond for the ap-

peal to that court for the amount of the judgment with interest and costs. The defendants again appealed to the Supreme Court of the United States, and one of the assignments of error was the entry of the decree against the sureties on the appeal bond for the amount found due from the defendants.

The statute of New Mexico provided that "in case of appeal in civil suits, if the judgment of the appellate court be against the appellant, it should be rendered against him and his sureties on the appeal bond."

The Supreme Court, in passing on this point, said (page 422):

> "The decree was rendered in the Supreme Court jointly against the defendants and their sureties in the appeal bond, and it is alleged for error that no such judgment could be rendered against the latter, but there is no error in this. It is a very common and useful thing to provide by statute that sureties in appeal and writ of error bonds shall be liable to such judgments in the appellate courts as may be rendered against their principals. This is founded on the proposition that such sureties, by the act of signing the bond, become voluntary parties to the suit, and subject themselves thereby to the decree of the court."

At a later date when the Supreme Court had under consideration the case of Johnson *vs.* Chicago, etc., Elevator Co., 119 U. S., 388, it took occasion to reaffirm the doctrine expressed in the case of Moore *vs.* Huntington, *supra,* and in the case of Beall *vs.* New Mexico, 16 Wall., 535.

In the Johnson case, the defendant filed a petition praying for a writ of attachment against Johnson, to be issued to the sheriff, directing him to attach a tug, and for a decree subjecting the tug to a lien for damages. On the giving of the required bond on behalf of the petitioner, a writ of attachment was issued and placed in the hands of the sheriff, and he made a return showing that he had attached the title and interest of Johnson in the tug, and had served him with process. Thereupon, on the same day, Johnson entered into

a bond as principal, with Henry A. Christie as surety, conditioned to pay all money which should be adjudged by the court in the suit to be due the petitioner, and upon the giving of said bond the sheriff was ordered to return the attached property to Johnson, which was done.

At the trial, damages were assessed by a jury on this petition, and a judgment was entered in favor of the petitioner against Johnson and Christie for $300.00 and costs. Exception was taken to this judgment, and on appeal to the appellate court of the first district of Illinois the judgment was affirmed, and an appeal was taken from that judgment to the Supreme Court of Illinois.

Among the assignments of error in that court was one to the effect that the judgment was entered against Christie without notice of process.

The statute upon which this attachment was issued provided, among other things, as follows:

> "Par. 15. The owner, or his agent or attorney, or any other person interested in such water-craft, desiring the return of the property attached, having first given notice to the petitioner, his agent or attorney, of his intention to bond the same, may, at any time before judgment, file with the clerk of the court in which the suit is pending, a bond to the parties having previously filed petitions against such craft, in a penalty at least double the aggregate of any sums alleged to be due the several petitioners, with security to be approved by the clerk, conditioned that the obligors will pay all moneys adjudged to be due such claimants, with costs of suit."
>
> "Par. 21. If, upon the trial, judgment shall pass for the petitioner, and the water-craft has been discharged from custody as herein provided, said judgment or decree shall be rendered against the principal and sureties in the bond: *Provided,* That in no case shall the judgment exceed the penalty of the bond, and the subsequent proceedings shall be the same as now provided by law in personal actions in the courts of record in this State. * * *"

The Supreme Court of Illinois affirmed the judgment of the appellate court of the first district, the decision being found in 105 Ill., 462, and to review that judgment Johnson and Christie, and another, brought a writ of error to the Supreme Court. In considering the objection raised by Christie, the surety, to the judgment entered against him, the Supreme Court said (page 400):

> "As to the objection made by Christie to the judgment against him, the Supreme Court of Illinois overruled it on the ground that, as the bond was given with the statute existing, the statute formed part of the bond, and the surety virtually consented that the judgment might go against him on the bond, under par. 21, if the plaintiff should be entitled to judgment against Johnson, citing Whitehurst *vs.* Coleen, 53 Ill., 247, and Hennies *vs.* The People, 70 Ill., 100. This was a correct ruling. Beall *vs.* New Mexico, 16 Wall., 535; Moore *vs.* Huntington, 17 Wall., 417."

In Guaranty Co. *vs.* Pressed Brick Co., 191 U. S., 416, it was said:

> "The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation, which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor."

See also Atlantic Trust, &c., Co. *vs.* Laurinburg, 163 Fed., 695; U. S., to use of District of Columbia *vs.* Bayly, 39 App. D. C., 105.

The foregoing authorities, we think, support the claim made by defendant in error that when a surety company signs a bond or undertaking like the one in suit, wherein it is recited that in consideration of the discharge from the custody of the marshal of the property seized by him upon the

attachment sued out against the defendant, and submits to the jurisdiction of the court, and consents to abide by and perform the judgment of the court, which judgment it agrees may be rendered against all of the parties signing said undertaking, it thereby, in effect, becomes a party to the litigation, and is bound by the action of the court in the premises. But even if this undertaking did not have the effect of making the surety a virtual party to the proceedings, it does, unquestionably, have the effect of causing the surety to be represented in the proceeding by its principal, the defendant in the case, and under these circumstances it is well settled that in the absence of fraud or collusion the surety is bound by everything done by the defendant in the course of the litigation, without notice to it.

This is particularly true in this case, because section 479 of the Code, *supra,* makes the undertaking in question equivalent to an agreement by the surety upon which a judgment may be entered *in the same suit* against it for whatever amount may be recovered against its principal.

As was said in the case of Johnson *vs.* Chicago, etc., Elevator Co., *supra,* "as the bond was given with the statute existing, the statute formed part of the bond, and the surety virtually consented that judgment might go against it on the bond, * * * if the plaintiff should be entitled to judgment against Johnson."

In this connection, it must not be forgotten that plaintiff in error was expressly given the right by statute, if it so desired,—section 460 of the Code—to enter its appearance in the suit and plead to the attachment; and said section further provides that any issue thereby raised may be tried by the court or by a jury impaneled for the purpose, if either party demand it. It, however, elected not to enter its appearance in this suit, and left its defense to its principal, the Semmes-Kelly Company, until after judgment had been entered against the defendant and its surety, when it did come in and succeeded in having that judgment set aside for the

purpose of having the issues raised in the suit tried over again.

When the case came on for trial a second time, plaintiff in error, through its counsel, took active charge of the defense of the suit, and in the course of the trial it reserved many exceptions, which are found repeated several times in the record and in the assignment of errors; but it is thought, for the sake of brevity, that it will be sufficient for the purposes of this hearing to take up and discuss only those errors which seem to be insisted upon in the brief filed by plaintiff in error.

III.

No Appraisement, under the Direction of the Marshal, of the Property Owned by the Defendant and Levied on While in Its Possession by the Marshal under the Writ of Attachment, is Required by Statute. Such Appraisement Would Not Be Binding on the Defendant and Its Surety, and Was Waived in This Case.

The first and principal argument advanced by plaintiff in error is that the judgment against it is illegal and void because there was no appraisement of the property levied on. In its brief it admits that if an appraisement had been made, judgment on the verdict against the defendant could also have been forthwith entered against the surety. On page 38 of its brief we find the following statement and admission:

> "Our contention in this case is that under sections 454 and 455 of the Code, where a person or corporation signs as surety an undertaking for the return to the defendant of the property attached, there must be an official appraisement at the time, of the value of the property; that this appraisement limits the liability of the surety on the undertaking; that the surety is not charged with the duty of seeing that the appraisement is made, but that this duty devolves either upon the plaintiff in the action, or upon the United

States marshal, *and that if such appraisement is made, and the plaintiff in the action recovers a verdict, there may be forthwith entered against the surety a judgment for the amount of the recovery, provided such recovery does not exceed the amount at which the property was so appraised.* But if, for any reason, an undertaking such as we have here is given without an appraisement having been made, the plaintiff is absolutely precluded from taking a judgment under the statute against the surety on the bond in the pending action between the plaintiff and the defendant. In that event, the undertaking must be regarded as a common-law undertaking and the rights of the plaintiff thereunder, if any, must be asserted in a separate action on the undertaking against the plaintiff and the surety, in which action all questions of waiver or estoppel, or kindred questions can properly be raised and determined."

It might be admitted that the measure of recovery against a surety on a delivery bond or forthcoming undertaking, where property attached is less in value than the plaintiff's claim is the value of the property released by such undertaking, and an appraisement under such circumstances is beneficial, and perhaps necessary for the protection of the surety, in order to establish the value of the property seized and the limit of the recovery which can be had against the surety. But what is the office or value of an appraisement where the property attached is admittedly far in excess of the amount claimed by the plaintiff in his attachment suit?

Under such circumstances, we know that the plaintiff's right of condemnation is limited to the extent of his recovery against the defendant, which recovery cannot be affected or enlarged in the slightest degree by reason of the value of the property attached, and a judgment, therefore, entered in such a case could, and would, have no reference to the appraised value of the property released, and would have to be satisfied either by a return of only so much of the property seized as would be sufficient to pay the judgment, or upon payment in cash of the amount of the judgment entered.

It is argued by plaintiff in error that because there was no appraisement made in this case, no judgment can be entered against it on account of the provision in section 455 of the Code that if judgment is recovered by the plaintiff it shall be a joint judgment against both the defendant and his surety "for the appraised value of the property."

The language quoted clearly had reference, and was intended to apply to the other class of undertakings provided for in section 454, which were to be given in cases where the property attached was found in the hands of persons other than the defendant, and which also specifically provided that in such event the property attached should be appraised under the direction of the marshal.

It will be noticed in considering the statute that section 454 of the Code gives a form of forthcoming undertaking to be given by the defendant to release attachment where the property is attached in the possession of the defendant, and also a form of undertaking to be given where the property attached is in the possession of some one other than the defendant. The conditions of these two undertakings are strikingly different, in that the surety in the first bond agrees to abide by and perform the judgment of the court in the premises in relation to said property, while in the second form, to wit, the one where the property is found in the possession of a person other than the defendant, the surety not only agrees to abide by and perform the judgment of the court in relation to the property, but also agrees that if the property shall be condemned to satisfy the claim of the plaintiff, judgment may be rendered against it for the value of the property and costs, unless said property shall be forthcoming to satisfy the judgment of condemnation.

Said section 454 further provides that where either of said bonds is given the attachment shall be sufficiently levied by the taking of the undertaking; but that in the latter case, to wit, where the property of the defendant is seized while in the possession of a third person, it provides that "the recital of the undertaking shall contain a sufficient de-

scription of the property, and its value, which value shall be ascertained by an appraisement to be made under direction of the officer and returned with the writ."

It clearly appears, therefore, that it was not intended by Congress that an appraisement should be made by the marshal where property is attached in the possession of the defendant, and he gives the forthcoming bond for its release, and the form of the bond suggested by the Code rather tends to indicate that it was intended to be used in cases where the defendant admitted possession of sufficient assets to pay the plaintiff's claim, and that the bond was to be given as a substitute for the property, upon which a judgment should be entered against the principal and the surety, without regard to the value of the property seized.

Certainly, if it was not the intention to release the property and to substitute the bond in lieu thereof, irrespective of the value of the property attached, it would have provided not only for an appraisement, but also for a condemnation of the property attached, as is required in cases where property of the defendant is attached in the hands of third persons.

When sections 454 and 455 of the Code are considered and construed together, we think there will be no difficulty in arriving at the meaning of the last portion of section 455, which requires that where a judgment is rendered in favor of the plaintiff it must be a joint judgment against both the defendant and the surety in said undertaking "for the appraised value of the property," and it will then be made plain that the joint judgment for the appraised value of the property has reference only to the undertaking given to release property in the possession of a third person from the attachment.

Section 454 deals with both classes of undertaking, and the first clause of section 455 also purports to deal with both classes of undertaking, because it says "either the defendant or the person in whose possession the property was may obtain a release of the same" by giving an undertaking; and the last clause of section 455, with relation to the entry of

judgment, also attempts to deal with judgments to be entered on both classes of undertaking, but by oversight or inadvertence a portion of the language used in that clause has application only to judgments entered upon the undertakings given where property of the defendant is attached in the hands of third persons. To this extent the clause may appear to be inconsistent with what precedes it, and with the condition of the first undertaking set forth in section 454, but can be given full force and effect by a construction which renders it applicable only to the second class of undertaking above referred to.

It is perfectly apparent not only from the form of both undertakings, but also from the language used in section 455, that a joint judgment is to be entered against the principal and his surety in either case, but that under the second class of undertaking mentioned it should be a joint judgment for the appraised value of the property, unless the property shall be forthcoming to satisfy the judgment of condemnation.

In this connection, we desire to further suggest that the approval of the undertaking by the court is only required under the statute in cases where the marshal has taken the property attached into his custody and has made a return to the writ of attachment; but where the marshal has merely levied upon property, and the defendant desires its release, the undertaking, as provided in section 454, is to be given to the *officer* and by him to be filed in the clerk's office with his return.

In the present case it was proved by the plaintiff in error at the trial (Rec., p. 50), and is nowhere contested, that the property seized by the marshal was of a value far in excess of the claim of defendant in error.

Furthermore, it was testified by Mr. Robinson that at the time this forthcoming bond was given, whether the representative of the Surety Company was present or not, the parties to the transaction all understood that the goods attached were worth $20,000, and that the bond was to take

their place. He said (Rec., p. 40): "We were instructed not to make the appraisement, to leave the matter as it stood. That the bond was ample, and given for that purpose. The understanding was clear and distinct that the bond took the place of the attachment at the time." He further said (Rec., p. 41): "We were warned in advance that the writ was coming, and in order not to tie up the large business, a forthcoming bond releasing the goods would be immediately given; that came right from Mr. Douglas, or some one in his office," but witness thinks it was Mr. Douglas himself.

Even, therefore, if it were admitted for the sake of argument that the surety's representative was not present at the time this bond was given, and formally agreed to waive an appraisement, it is impossible to perceive how it was, or could have been, injured by the failure to make a formal appraisement.

It is perfectly manifest that the surety knew the extent and value of the defendant's stock in trade, and knew that the object of the forthcoming bond was to release that stock in trade, and was satisfied that said stock in trade far exceeded in value the amount of the plaintiff's claim, because its agent testifies that he had the application for this bond under consideration for two days before it was actually given (Rec., p. 44). That he had two or three conversations with Charles W. Semmes, the president of the defendant, before the bond was given (Rec., p. 44), and that he not only obtained from him a written application or statement, setting forth that the property of the defendant company was worth $100,000, and its assets were far in excess of its liabilities (Rec., p. 45), but he also knew the personal worth of the president of said company, who signed the application.

Furthermore, it appears from the record that the statement endorsed upon the schedule of levy by the marshal, of the seizure of a "large stock of merchandise, groceries, canned goods, etc., located at stores 614 and 616 Pennsylvania avene, valued at $20,000," was written on the schedule of levy by the chief deputy marshal before the

bond was actually signed and delivered by the Surety Company (Rec., p. 42), and that paper, which also showed it was not signed by any appraiser appointed to appraise the property, was filed in the clerk's office with the bond signed by appellant on April 23, 1908, and that there was no subsequent appraisal of the property by appraisers, and no request for such appraisement by the defendant or the Surety Company.

This condition of affairs was allowed to continue by the Surety Company for a year or eighteen months after the date of the levy and before the case was reached for trial. Yet during all this time it never made claim of any character that it had been released by the failure of the marshal to appraise the property attached, or claim that it had not consented to waive such appraisement; and it is peculiarly significant that as late as September, 1910, when it filed its application to set aside the judgment which had been entered on the 25th of May, 1910, against the Semmes-Kelly Company and itself, which application was supported by affidavits, it nowhere suggested that the Surety Company was released because of the failure of the marshal to make an appraisement, although its own attorney in fact had examined the record in the case a short time after the entry of said judgment of May 25, 1910 (Rec., pp. 15 to 19); and it was not until this case was called for trial a second time, on May 6, 1912, that for the first time it advanced the claim that no judgment could be entered against it because of the failure of the marshal to make an appraisement.

It seems to us, therefore, clear that the testimony of the chief deputy marshal, to the effect that at the time the attachment was levied all the parties in interest agreed that the bond should take the place of the attachment, and that no appraisement was necessary or should be made, is a correct statement of the facts as they actually took place and were understood and agreed to by the parties to the litigation including the surety on the defendant's undertaking.

The Surety Company knew, as matter of law, that no appraisement was required by the Code, and if it desired or considered an appraisement necessary for its protection, it should have insisted that one be made. Not having demanded an appraisement, or ever having made objection to the return made by the marshal as to the value of the property levied upon until May, 1912, when this case was called for a second trial, it is respectfully submitted that it has waived whatever right it may have had to an appraisement, and it is now estopped from setting up such a defense in this suit.

It is submitted that a surety on a forthcoming bond is not entitled, as a matter of constitutional right, to any particular form of appraisement, as distinguished from what is required by the statute under which the attachment was issued. If the statute requires an appraisement in a particular manner, the statute, of course, must be followed; but if the statute is silent on the question of appraisement, the surety makes his contract with reference to that statute, and the value of the property levied upon may be fixed in any manner which seems appropriate and fair to the trial court.

It is not necessary for us to refer in detail to the cases cited by the plaintiff in error in support of this branch of the argument, because they are all based upon State statutes, containing specific provisions requiring an appraisement of the property levied upon in a particular manner and by appraisers appointed in pursuance of the requirement of the statute, or by the jury trying the case between the plaintiff and the defendant.

There is no reason for the contention that the undertaking in this case should be considered as a mere common-law undertaking, and that the rights of the plaintiff thereunder must be asserted in a separate action on the undertaking against the surety, because section 460 of the Code authorizes the surety on the forthcoming undertaking to plead to the attachment, and provides that any issue of fact raised by

such pleas may be tried by the court or by a jury impaneled for the purpose, if either party desires it.

Whatever legal rights the surety company had, therefore, could not only be presented in the attachment suit, but were in fact presented during the trial of this case.

The following authorities are cited in support of the contentions hereinbefore set forth.

"In an action upon an undertaking in an attachment suit, after a verdict and judgment, the defendant—the surety in the undertaking—cannot introduce testimony on the trial to show, in contradiction of the recitals in the undertaking, that no application had been made for the discharge of an attachment in the action in which the undertaking was entitled, and that no attachment had been issued or granted.

"It is not essential to the validity of the undertaking that the plaintiff should compel its execution by actually suing out an attachment and making a levy. The parties may waive the issuing of an attachment and a seizure of the property under it and for the defendant to give and the plaintiff to accept, in consideration of the waiver, such an undertaking as the defendant would have been required to give in an application to discharge an attachment actually issued and levied.

"The fact that the defendant has put in an undertaking which recites that an attachment had been issued and that he was about to apply for its discharge, *is conclusive evidence of such waiver.* It is enough that the undertaking is binding between the principal parties under such circumstances, to hold sureties."

Coleman *vs.* Bean, 32 How. Pr. Reps. (N. Y.), 370.

Martin *vs.* Gilbert, 119 N. Y., 298.

Blake *vs.* McNamara, 9 Misc. Reps. (N. Y.), 212.

"The surety on a replevin bond is estopped in any subsequent proceedings from denying the regularity of the levy or the liability of the property to seizure under the writ."

Brown *vs.* Hamil, 76 Ala., 506.

"A surety on a replevin bond is bound by a decree rendered against an administrator, and cannot review the proceedings in that case, even though they be irregular and erroneous."

Barry *vs.* Frayser, 66 Tenn. Reps., 206.
Hauser *vs.* Ryan, 73 N. J. L., 274.

"Whenever sureties obligate themselves to the performance of an act which is dependent upon judicial proceedings, the liability is assumed with reference to the power of the court to do any and all things within the scope of its authority which may be done in the ordinary and regular prosecution of the suit."

Clark *vs.* Dreyer, 9 Colo. App., 453.

"A surety on a replevin bond can make no objection to the form of proceedings against his principal; the principal is alone responsible for the defense, and if he waive technical or substantial objection to the manner and from of proceeding against him, a surety on his bond is bound by the result of the litigation on its merits."

Greenlaw *vs.* Logan, 70 Tenn. Reps., 185.
Council *vs.* Averett, 90 N. Car., 168.

In the case of McRae *vs.* Austin, 9 La. Ann., 361, the statute provided that,

"The sheriff must take charge, and keep possession, of all goods and effects which he may have attached * * * and he shall make, in the presence of two witnesses, an exact and minute inventory of the same, which he shall be bound to deliver, or send annexed to his return, to the office of the clerk of the court whose mandate he has executed."

The appellants had been condemned as sureties on a bond to release an attachment, and the court said:

"* * * the only ground of defense relied on, besides those which were considered in the other case, is that no inventory was made of the property attached as required by article 257, C. P. We agree with the court below, that as the attachment was dis-

solved by a bond being substituted for the property, this formality was waived, and neither the defendant nor his sureties could make any exceptions to the regularity of the proceedings on that ground. Judgment against sureties affirmed."

IV.

The Judgment Entered May 25, 1910, Was Not a Personal Judgment against the Defendant, Semmes-Kelly Company, but Was in Fact a Joint Judgment against said Defendant and Its Surety, in Substantial Conformity with the Statute, and No Question of Waiver or Election to Accept a Personal Judgment against the Defendant Alone is Presented by the Record.

It is contended by the plaintiff in error, under its third subdivision of argument, that the first judgment entered in this case May 25, 1910 (referred to in error as having been entered May 19, 1910), was merely a personal judgment against the defendant, and was so treated by the subsequent issuance of execution and garnishment, and that by the taking of such personal judgment against the defendant Semmes-Kelly Company the plaintiff abandoned and waived its right to a judgment against the surety on the undertaking.

We cannot conceive how such an argument can be advanced in this case, because the record does not sustain it. The record shows (Rec., p. 15) that a joint judgment was entered against the defendant and the plaintiff in error, its surety, in the sum of $20,000, the value of the property attached, to be released upon the payment by the defendant, or the surety, to the plaintiff of the sum of $8,748.29, with interest and costs, upon which payment the undertaking filed April 23, 1908, was to be discharged and released. In other words, this judgment was in fact a joint judgment against the defendant and its surety, entered in substantial conformity with the requirements of the statute and of the

undertaking itself, permitting a summary judgment against the surety on a verdict rendered against the defendant. While the form of the judgment may not have complied literally with the language of the statute, it accomplished the only thing that could be done under the circumstances. The attachment was levied on a large stock of goods, more or less perishable in nature, which was released by the giving of the undertaking. After the giving of this bond, the defendant continued with its business, selling and disposing of this same stock, and finally went into bankruptcy June 23, 1909 (Rec., p. 16).

The case, in the meantime, had been placed on the calendar, and was not reached for trial until May 25, 1910, almost one year after the defendant had gone out of business (Rec., p. 15). It was not necessary, therefore, we submit, for the court to do a vain and useless thing by requiring that the judgment in form should first provide for the redelivery of the attached property by the marshal by a given date, and upon failure thereof the plaintiff should have judgment against the defendant and its surety for the amount of the verdict. The property levied on had long since passed out of existence, and the bond was substituted in its place and stead; and in the nature of things the surety well knew that it could only respond to its obligation by the payment of money.

But whether the form of this judgment entered on May 25, 1910, was right or wrong, it was undoubtedly a joint judgment against both the defendant and the surety company. The issuance of *fi. fa.* on August 16, 1910, and of garnishment on August 30, 1910, on which credits of the Surety Company in the hands of its agents were attached (Rec., p. 15), were both directed at the Surety Company,—the principal defendant being then in bankruptcy—and are further evidence of intention to hold the Surety Company to its obligation as well as under the judgment.

The judgment against the surety was not set aside until October 21, 1910 (Rec., p. 29), and we are at a loss to under-

stand how plaintiff in error can argue from these facts that defendant in error elected to take a personal judgment against the principal defendant, thereby releasing the surety. No affirmative act by the plaintiff indicating such an election or waiver is charged, although the argument of plaintiff in error seeks to create the impression that the efforts to collect the judgment by the processes of the court were made after it had been set aside as to the surety, instead of before, as appears from the record.

It will be our contention, hereinafter set forth, that the action of the trial court in setting aside the joint judgment of 1910 as to only one of the two joint judgment debtors had the legal effect of setting aside the whole judgment as to both defendants. If this contention is well founded in law, then there was no legal judgment remaining against the defendant Semmes-Kelly Company, and, of course, all questions of waiver and election by the defendant in error pass out of the case.

It is confidently believed that it was the intention of the trial court to set aside said judgment as to both defendants and to grant a trial *de novo,* as it will be noticed in his opinion he refers to the matter before the court as "the defendants' motion," and then proceeds to set aside the verdict which had been rendered against the principal defendant alone, as well as the judgment entered against both defendants. If by inadvertence or mistake the order based on the opinion of the court was so framed by the clerk as to vacate the judgment only as to the surety, then the trial court had the power at any subsequent term to correct it.

In Encl. of Pleading and Practice, vol. 15, page 214, we find this language:

> "Thus, according to some decisions, where it clearly appears that the judgment should have been rendered as of course upon the facts in the record, the court will assume to treat the failure to render such judgment as a mere clerical misprision, and will amend the judgment so as to make it conform to that which should have been rendered upon the facts."

This language is found in a clause considering the right of a judge to amend or correct clerical misprisions in the interest of justice at a term subsequent to that in which the judgment is entered.

The case of Forbes *vs.* Navara, 63 Miss., 1, was an attachment suit, in which property had been released on a forthcoming bond, and there was judgment at the June term of the court against the defendant alone. At the December term following the court awarded a writ of enquiry, and judgment was rendered against the defendant and the surety on the forthcoming bond; on the ground that the sheriff was one of the plaintiffs the bond was vacated, but the upper court held the bond valid, and regarding the judgment said:

> "In McKenney *vs.* Green, 52 Miss., 70, it is said by the court that a plaintiff who fails to obtain judgment against both principal and surety, may correct the error by appeal from the judgment entered against defendant alone, but we do not understand that it was intended thereby to indicate that no other appropriate remedy existed. Upon the verdict of a jury in favor of the plaintiff against the defendant, on the trial of the issue in chief, the plaintiff was entitled as a matter of right to a judgment on the bond of the defendant. Under such circumstances, it must be presumed that the court directed proper judgment to be entered, and that the failure to do so was occasioned by the negligent omission of the clerk in the performance of a mere clerical duty. * * * In such cases the judgment may be amended after the lapse of the term at which it was rendered so as to make it conform to that directed to be entered by the court. Judgment quashing bond reversed."

We have examined the authorities cited by plaintiff in error in support of this portion of its argument, and cannot see that any of them are controlling of the questions under consideration. They are all based upon State statutes, having requirements wholly different from ours, and some of them involve questions of the effect of judgments by con-

fession, either in fraud of the rights of other attaching creditors or in violation of the conditions of the bonds on which it is sought to hold sureties or in violation of the express provisions of the statute regulating and fixing the liability of such sureties.

The statutes referred to are not only dissimilar from the provisions of the Code, *but under none of them is the surety required to submit to the jurisdiction of the court and to consent that judgment may be entered against it in the same case.*

We might further suggest that the cases cited on pages 48 and 50 of the brief of plaintiff in error, to the effect that when a plaintiff in an attachment suit takes a personal judgment against the defendant he loses his lien against any property which had been seized under the writ of attachment, are wholly irrelevant to the questions under discussion, because section 455 of our Code provides that the defendant, or the person in whose possession the property is, *"may obtain a release of same from the attachment"* by giving the undertaking required by section 454; so that under our law, when the undertaking is given, all property is released from the lien of the attachment, and the plaintiff must thereafter look to the undertaking and not the property for the satisfaction of his claim.

Many of the cases cited are from Indiana, and involve the liability of sureties under section 168 of the Indiana Code. The courts of that State have held that by the giving of such an undertaking under section 168 *the lien of the attachment on the property is not discharged,* but that under the practice of those courts the subsequent taking of a personal judgment against the defendant, without a condemnation of the property attached and an order for its sale, and the issuance of a special execution to the sheriff to sell the same, was equivalent to a dismissal of the attachment proceeding, and the delivery bond executed therein ceases to be effective.

V.

The Ruling of Justice Stafford to the Effect that the Order of October 21, 1910, Setting Aside the Verdict of May 19, 1910, and the Joint Judgment of May 25, 1910, as to the Plaintiff in Error Operates in Law to Set Aside the Verdict and Judgment as to the Defendant as Well as the Surety Was Correct, and He Therefore Had the Right to Order a Trial de Novo.

When this case came on for trial before Mr. Justice Stafford and a jury, on May 6, 1912, the plaintiff in error, who, at a former term of court, prayed for a trial on the merits, now objected to such trial for the reasons set forth (Rec., p. 29), which were in part that, because there was already a judgment against the defendant, there was no authority of law for the swearing of another jury to try the same issues, and, further, that there could be no trial as to the Surety Company because there was no issue joined between the plaintiff and the Surety Company. The other reasons assigned have been considered elsewhere.

The trial court, however, ruled and held that the legal effect of the order of Judge Barnard, setting aside the *verdict and judgment* as to the surety, was to set aside and vacate the verdict and judgment as to the principal as well, and that the trial should proceed *de novo* (Rec., p. 31).

It is argued by plaintiff in error that this ruling was erroneous, and that as a result a trial was had without the appearance of the defendant, and the surety was compelled to assume the burden of defense and of setting up as best it could the defense which the defendant had against the plaintiff's claim. This was exactly the privilege which the surety prayed to be given at the time it made application to set aside the former verdict and judgment entered when the defendant and the defendant's trustee in bankruptcy were defending the case (Rec., pp. 15, 19).

The record shows that the president of the defendant Semmes-Kelly Company was present in court throughout the second trial, produced letters and records which were offered in evidence, and testified as a witness on behalf of the Surety Company (Rec., p. 49).

The record also shows that when the court set the first verdict and judgment aside the case was ordered on the calendar for trial on the merits (Rec., p. 29); that it was reached for trial in regular order on May 6, 1912 (Rec., p. 30), at which time the defendant's surety appeared by counsel and offered evidence as to the whole defense set up in the pleas filed by the defendant.

Under these circumstances, it would seem unnecessary to further discuss the claim that trial was had without notice to and appearance by defendant.

The only material question raised under this assignment of error is whether the ruling of Judge Stafford in holding that when a joint judgment against two parties is set aside as to one only it has in law the effect of setting aside the whole judgment as to both defendants is correct. If this ruling was correct, then the court had a perfect right to order a trial *de novo*, and many of the objections raised by appellant pass out of the case.

The attachment sections of the Code did not contemplate separate judgments against the defendant and its surety, but provided for the entry of one judgment as an entirety against both the defendant and surety. Section 455 specifically provides that when judgment is rendered in favor of the plaintiff "it shall be a joint judgment against both the defendant and his surety or sureties in said undertaking."

In addition to this, we know that at common law a judgment against two or more parties was always considered as an entirety, and that if it was void as to one, or had to be set aside as to one defendant, it was regarded as void against all, or had to be set aside as to all defendants, as it could not, in contemplation of law, be separated into parts.

This question was fully considered by the Court of Appeals of Maryland, in the case of Hanley *vs.* Donoghue, 59 Md., 239, wherein the court said:

> "It appears from the pleadings in this case, that suit was brought in Pennsylvania against Charles and John Donoghue on a joint contract; that Charles was regularly summoned, but no process of any kind was issued against John, nor did he appear, in person or by attorney, to the suit. Judgment was, however, subsequently recovered against both defendants, and on this judgment, suit is brought in this State against Charles. In support of this action, it is contended, that the foreign judgment although void as to John is valid and binding on Charles, the party who was summoned.
>
> "At common law a judgment was regarded as an entire thing, and being an entirety it has been held repeatedly, that it could not be affirmed as to one or more defendants, and reversed as to others." Citing authorities.

In the case of Van Renselaer *vs.* Whiting, 12 Mich., 449, plaintiff recovered judgment against John L. Whitney and J. Tallman Whiting for $2,793.83, in assumpsit, in September. In December J. Tallman Whiting made affidavit that he was liable for only part of the judgment, and explained his failure to make defense in due time, and moved that the judgment be vacated. The court ordered "that the judgment heretofore entered in this case be and the same is hereby set aside and vacated as to the defendant J. Tallman Whiting."

On appeal the upper court said:

> "We do not consider it necessary to discuss the question whether certiorari will lie in cases like the present. The effect of vacating the judgment as to J. Tallman Whiting was to vacate it as to the other defendant also; and there is no judgment in the case. The parties have, therefore, now all the rights in the circuit court which they would have in any case of the vacation of a judgment. Where the circuit courts

have power to set aside verdicts, grant new trials, and vacate judgments, it is a discretionary power, the exercise of which we cannot review. The present case comes within this principle."

See McArthur *vs.* Oliver, 53 Mich., 299.

"A judgment was rendered against several defendants on a note, and a new trial as to part of the defendants was granted. Held, that the legal effect of such an order was to vacate the entire judgment. 'Under the statute there is only one final judgment to be rendered in a case, and that judgment is not divisible.'"

Long *vs.* Garnett, 45 Texas, 400.

"Where a judgment is rendered against two defendants on a joint contract, the granting of a new trial on the application of one vacates the judgment as to both defendants."

Hughes *vs.* Lindsay, 10 Ark., 555.

"In New York, where a judgment is considered as an entirety, it must be affirmed or reversed in *toto*."

Richards *vs.* Finney, 12 Johns., 434.

A judgment of a court of another State against two persons jointly who were residents of this Commonwealth, over one of whom only the court had jurisdiction, being entire and unqualified, is, in the absence of any evidence of the law of the other State upon the subject, void against both.

Wright *vs.* Andrews, 130 Mass., 149.

Hall *vs.* Williams, 6 Pick., 232.

Where a bill bases plaintiff's claim upon a tax deed purporting to convey the entire interest in certain real estate, and the decree based on such bill is not binding upon the owner of a life interest in such property because of defects in the publication of the summons, it cannot bind the owners of the estate in remainder. Chief Justice Fuller said:

> "The decree assumed to adjudge the title in Kuhn as an entirety, and if not binding as to the whole estate, was certainly not binding as to the estate in remainder."
>
> Meyer *vs.* Kuhn, 65 Fed., 705.

Under an act of Virginia, the defendant could enter special bail and defend the suit at any time before the entering up of judgment upon a writ of enquiry executed; and the appearance of the defendant, or the entry of special bail before such judgment, discharged the appearance bail. If the defendant did not appear or give special bail, the appearance bail could defend the suit, and would be liable to the same judgment as the defendant would have been liable to.

In this case the defendant, Andrew Bartle, appeared and consented to a reference to an arbitrator, and judgment was rendered for the amount of the award against "Andrew Bartle, the defendant, and Samuel Bartle, the security for his appearance."

The court, per Chief Justice Marshall, said:

> "Were it necessary to pursue this argument further, we should all be of opinion that judgment could not be rendered against the appearance bail on this award, and without executing the writ of enquiry, unless by his consent. But as we are of opinion that the appearance of the defendant has discharged his bail, it is unnecessary to pursue the subject further. *The judgment against Samuel Bartle is erroneous, and, as it is joint, it must be reversed against both.*"
>
> Bartle *vs.* Coleman, 6 Wheat., 475

The Court of Appeals in its decision in this case announced and followed the common-law rule, to the effect that where a judgment against several defendants is vacated, and a new trial granted as to one, the judgment as to all is set aside, on the theory that the judgment is an entirety. That was the law of Maryland, as stated in Hanley *vs.* Donoghue, *supra*, and it has always been recognized as the law of this District. In the case of Jackson *vs.* Hulse, 6 Mackey, 548, decided by

our general term, which was our Court of Appeals before the establishment of the present Court of Appeals, the court, through Mr. Justice Merrick, said:

> "It is also a well-settled principle of the common law that where there is a joint judgment which is void as to one of the parties, it is void as to all. That matter has been settled by adjudications innumerable in this country. I need refer only to the case of Hall *vs.* Williams, in 6 Pickering, followed up and sustained by the opinion of the Supreme Court of Massachusetts, in the case of Wright *vs.* Andrews, in 130 Massachusetts, page 150, in which the opinion was given by Chief Justice Gray, now a member of the Supreme Court of the United States, and also sustained by a case in 59 Maryland, 238, Hanley *vs.* Donoghue. So that there is a concurrence of authority that at common law such a judgment, if void as against one, is void against all. That goes to the root of this action and renders it unnecessary to enlarge upon the case."

In Claflin *vs.* Dunne, 129 Ill., 241, plaintiff had judgment against Horace B. Claflin and six other defendants, but it was subsequently shown that Claflin was dead at the time the judgment was rendered, and a motion was made to vacate the judgment. The court said:

> "But it is claimed that, although the judgment may be vacated against Horace B. Claflin, it should be sustained as to the other defendants. We do not concur in this view. The judgment is a unit as to all the defendants, and if erroneous as to one, it is erroneous as to all. * * * We think that the Superior Court erred in refusing to vacate the judgment."

So also in the case of Williams *vs.* Chalfante, 82 Ill., 218, judgment was rendered against five defendants, and the court said:

> "This was error, as the return of the summons shows that one of the defendants, James W. Robb,

> was not served with process; and the judgment being an entirety, must be reversed as to all the defendants."

To the same effect is Jansen *vs.* Varnum, 89 Ill., 102; Samonski *vs.* Chicago Co., 156 Ill. App., 300; O'Donnell *vs.* Kavanaugh, 158 Ill. App., 603.

It will be found that the case of Kitchens *vs.* Hutchins, 44 Ga., 620, relied on by plaintiff in error, is controlled by section 3274 of the Georgia Code.

In the earlier case, however, of Tedlie *vs.* Dill, 3 Kelly (Ga.), 104, a judgment was entered against joint defendants, one of whom was dead at the time. The court said:

> "A judgment as being an entire thing cannot be reversed in part and stand good as to the other part, or be reversed as to one party and remain good against the rest."

So also in Finley *vs.* Southern Ry. Co., 64 S. E. Rep., 304 (Ga., 1909), which was an action for personal injuries, and the appellate court found error in the charge of the court to the effect that plaintiff must recover against all or none of the several defendants. The court said:

> "A plaintiff can sue one or more than one, or he can sue all of several joint tort feasors in the same action and the jury by its verdict can bind one and relieve another, as the evidence may authorize; but if the verdict be rendered against all the defendants, the judgment thereon is single, and must stand or fall alone. Such a judgment is in law a creature of such nature that it cannot survive the severance or amputation of any one of its members."

In Trousdale *vs.* Donnell, 4 Humphreys (Tenn.), 273, judgment was entered against two defendants jointly, only one of whom had been served. The court said:

> "* * * being void as to him, it is void as to Trousdale, for a judgment is entire and cannot be good in part and bad in part."

In Buffam *vs.* Ramsdell, 55 Maine, 252, which was a suit in equity to redeem a mortgage and the question came up as to the validity of a judgment entered against two defendants, one of whom had not been served with process, the court said:

> "The judgment being an entire thing, if void in part is void in all; if reversed as to one of the parties, it must be reversed as to all."

In Rangely *vs.* Webster, 11 New Hampshire, 306, the judgment was held to be single and entire against all of the defendants.

In Sheldon *vs.* Quinlen, 5 Hill (N. Y.), 441, there was judgment against two defendants. The judgment was reversed as to one defendant, and the appellate court said:

> "Where there are two judgments, as in the action of account or where the judgment is for distinct things, as for damages and costs, there may be an affirmance in part and a reversal as to the residue. But the case of a judgment against several defendants, whether the action be for a tort or upon contract, does not come within the rule. The judgment is entire as to all of the defendants, and must be reversed or affirmed in toto. * * * The doctrine is perfectly well settled."

Counsel for plaintiff in error in their brief, page 25, state that the doctrine that a judgment is an entirety and must stand or fall as a whole, while at one time was the accepted doctrine, has been by the overwhelming weight of modern decisions entirely exploded and abandoned, and they cite Freeman on Judgments, and certain cases which are not very modern, in support of that statement. While it is true that there are decisions in three or four of the States which do not adopt the common-law theory of the entirety of a judgment, those decisions are influenced, if not absolutely controlled, by statutory enactments in said States, and some of them expressly announce the common-law rule on the sub-

ject, but state that under the law and the practice of those States exceptions to that rule have been found. Thus, in the case of Neenan *vs.* City of St. Joseph, 126 Mo., 89, cited by plaintiff in error, the court said:

> "Under some of the early decisions of this court, it was repeatedly said that a judgment at law is an entirety and cannot be recalled or reversed as to one party and stand good against the other. If set aside as to one, it must be set aside as to all, in its entirety. Randalls *vs.* Wilson, 24 Mo., 76; Rush *vs.* Rush, 19 Mo., 441; Pomeroy *vs.* Betts, 31 Mo., 419; Hulett *vs.* Nugent, 71 Mo., 134; Dickerson *vs.* Chrisman, 28 Mo., 141. * * *
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> "In a late case it was said: 'Those cases which hold that a judgment against several defendants for a sum of money is an entirety, and if erroneous as to one, is erroneous as to all, have no applicability to cases where the judgment or decree is as to land. City *vs.* Lanigan, 97 Mo., 180. The case involved a proceeding to condemn land for a street. and was against a number of persons who owned distinct parcels of land. One only of these parties appealed. In such a case the judgment of condemnation is against, and for damages, in favor of, each individual land owner severally and can not be regarded as an entirety.' * * *
>
> "It will be seen from these cases that the rule has ever been subject to exceptions."

The case of Holton *vs.* Towner, 81 Mo., 360, was an action of ejectment, and the court said:

> "We are aware that it has often been stated in general terms that a judgment at law, when void as to one, is void as to all. But this language is not entirely accurate when the judgment is against parties who are severally liable. *All contracts in this State which were joint at common law are declared by statute to be joint and several,* and the judgment offered in evidence is based upon an instrument * * * which will be presumed to be a several contract."

The case of Murphy *vs.* Orr, 32 Ill., 489, cited by plaintiff in error, undoubtedly does not state the law of Illinois on this subject as shown by the cases hereinbefore set forth.

The case of Cheek *vs.* Pugh, 19 Ark., 574, cited by plaintiff in error, was a separate action on a replevin bond against the sureties therein. The declaration referred to the prior suit of Pugh *vs.* Southall, which had gone to trial and judgment entered against the administrator of Southall, he having died in the meantime, but in entering up the judgment against the administrator, by the misprision of the clerk, it appeared to have been entered up against the defendants in this case as well as the administrator, which, under the statute of that State, could not be done. The defendants in this case, sued as sureties on the replevin bond, claimed that the judgment in the former case was absolutely void because of the facts above referred to, but the court said, referring to these defendant sureties:

> "They were not parties to the action. Pugh was the plaintiff and Southall the defendant in the attachment suit. His property was seized under the writ, and in order to release it he executed the bond sued on in this case, with the appellants as sureties. When judgment was finally rendered against his administrator, it was also without authority of law, and perhaps by the mistake of the clerk, rendered against the appellants, as securities in the replevin bond. There was no proceeding before the court upon which the judgment against them could be based. But the judgment was not void as to the administrator of Southall, who was the only defendant in the suit."

The case of Council Bluffs Bank *vs.* Griswold, 50 Nebraska, 753, was an action on an Iowa judgment, and the judgment was upheld against one of the defendants, although void as to the other for want of service because of the statute of Iowa, which provided that all persons bound by a judgment or decree rendered in that State are both jointly and severally liable thereon.

The courts of Nebraska, in passing upon the laws of their own State, however, have recognized the common-law rule many times, and a collection of the authorities on this subject will be found in the case of Sturgis *et al. vs.* Miller, 79 Neb., 404, where it was held:

> "A judgment rendered against one defendant as principal, and others as sureties, and set aside as to the principal on his motion, that the interests of the judgment debtors were inseparable, and that the vacating of the judgment as to the principal vacated it *ipso facto* as to all parties."

The case of Ash *vs.* McCabe, 21 Ohio State, 181, cited by plaintiff in error, follows the Ohio practice based upon the statute of that State, as indicated in the case of Douglass *vs.* Massie, 16 Ohio, 271.

In the case of Jameson *vs.* Pomeroy, 9 Pa. St., 230, it was sought to have a judgment against two defendants declared void because one of them had not been served, but the court said it had power to correct the judgment and enter it against the defendant, who had been served, under the authority of the act of the legislature of June 16, 1836.

Finally, in the last case cited by plaintiff in error, Gray *vs.* Stuart, 33 Gratt. (Va.), 358, the court distinctly recognized and announced the common-law rule on the subject, and suggested that the rule had been modified by the statute of that State, but proceeded to argue that there was a manifest distinction between an erroneous judgment and a void judgment. That the judgment in question, as to one of the defendants who had not been served, was a void judgment, a mere nullity, and that it must be regarded as only a judgment against the remaining defendants, and concluded with the statement:

> "In this view of the case it is plain that the rule of the common law invoked by appellants' counsel has no application to this case."

It is submitted, therefore, that none of the cases cited by plaintiff in error, in the absence of statute or established practice, attempts to repudiate the common-law rule on this subject, and in view of the authorities hereinbefore cited in support of said rule, we submit that the weight of authority is with us.

In concluding this branch of the case, we desire to suggest that Black on Judgments, 2d edition, published ten years after Freeman on Judgments, quoted by plaintiff in error, in his discussion of the subject of the entirety of joint judgments, sections 211 and 315, contradicts the statement in Freeman that a preponderance of authorities maintain that a judgment against two or more is not void as against those of whom the court had jurisdiction, though void as against the others.

VI.

The Trial Court Committed No Error in Admitting Evidence of Witness Cusick as to Telephone Conversations, and, if Erroneous, was Immaterial and Harmless. There is No Constitutional Question Involved in This Case.

In the fourth division of argument of plaintiff in error it is claimed that the trial court committed error in permitting the witness Cusick to testify as to telephone conversations had by him with the chief deputy marshal after the witness had levied upon the stock of goods of the defendant and while he was still in the defendant's store (Rec., p. 38). At the time this testimony was offered the court stated that it was given not for the consideration of the jury (Rec., p. 38), but for the guidance of the court when it came to enter judgment on the verdict. As a matter of fact, by the time the parties got to the jury, all questions raised during the course of the trial had been eliminated, either by consent of the parties or by rulings of the court, and the only question that was left for the consideration of the jury was whether the plaintiff's

admitted claim of $9,937.20 should be reduced or not by the allowance to the defendant of a set-off in the sum of $4,310.12.

In its charge to the jury the court clearly and specifically set forth this fact (Rec., p. 51). In addition to this, the evidence was merely cumulative of what had already been testified to. For these reasons, the Court of Appeals refused to pass upon the question. The court said:

> "It is unnecessary to determine the admissibility of this evidence, for if inadmissible, it could not constitute reversible error, inasmuch as it related solely to the value of the property attached, which it is conceded was far in excess of the amount of the attachment."

There is No Constitutional Question Raised in This Case.

In view of the argument already made on this question in the earlier portion of this brief, it is deemed unnecessary to make further answer to the last portion of the brief of plaintiff in error on this subject, other than to repeat that by its contract of suretyship the plaintiff in error waived whatever constitutional right it had to insist upon a separate and distinct suit against it on said undertaking by submitting itself to the jurisdiction of the court and agreeing that judgment might be entered against it in the same suit brought against the principal defendant.

We submit further that it had no constitutional or statutory right to insist upon an appraisement of the property levied on by the marshal. It knew that the statute did not specify the particular manner or by whom the property attached should be appraised, and it therefore knew and agreed that the court would either have to exercise its inherent power to inquire into the value of said property, if such inquiry was necessary for the ascertainment of the amount of the judgment to be entered against the surety, or would have to submit that question to a jury for decision. It also knew that it

was given the specific right by section 460 of the Code to plead to the judgment any defense it saw fit to interpose, and that the issue raised by any such plea should be tried by the court or by a jury impaneled for that purpose, if either party so desired; and it knew that under section 479, defining the very undertaking which it had entered into, the court had the right to enter judgment against it in the same suit or proceeding in which recovery was sought against its principal.

All of these statutory provisions entered into the undertaking executed by plaintiff in error and formed a part of its contract, and it is submitted that not only is the surety bound by these provisions of the law, but that said provisions do amply provide for and protect every constitutional right which the surety on this undertaking was entitled to, and that it did in fact have its day in court, and presented every defense it possessed or that the principal defendant in the case possessed.

There is no reason why parties competent to contract cannot agree to waive their day in court and be bound by such agreement, and there is no argument or authority advanced to the effect that the signing of the undertaking in suit did not in fact waive any right which the surety might have to a day in court.

We know, as a matter of local history, that since the decision of the Court of Appeals in Tenney *vs.* Taylor, 1 App. D. C., 223, which was decided before our code was adopted, every undertaking and every bond given on appeal to act as a supersedeas have required the surety to submit to the jurisdiction of the court and to agree to make good the judgment which may be entered against their principal in the litigation; and we know that summary judgments have been entered on such bonds against the surety in innumerable cases. We might add that the same kind of bonds have been required on appeals to this court, and this court has had occasion several times to refer to the obligation

assumed by the surety and to uphold the right of the court to enter a summary judgment against the surety. Indeed, in the case of Beall *vs.* New Mexico, 16 Wall., 535, this court said there was no fundamental constitutional principle involved, and that it is a common and useful thing to provide by statute that sureties on appeal and writ of error bonds should be liable to such judgment in the appellate court as may be rendered against their principals.

We have found no cases holding that where a surety has expressly submitted to the jurisdiction of the court, and agreed that whatever judgment is entered against its principal may also be entered against it, the entry of such judgment in a summary manner against it is unconstitutional, because it deprives the surety of the right to trial by jury and its day in court, and none is cited by plaintiff in error.

In Brandt on Suretyship and Guaranty, vol. 2, paragraph 782, this subject is discussed as follows:

> "The constitutionality of statutes which provide summary remedies against and on behalf of sureties has been questioned, but they have generally been held to be constitutional. Thus, statutes which provide that, when a judgment which has been appealed from is affirmed, judgment shall at the same time be entered against the surety in the appeal bond, which authorizes the issuing of a fee bill against a person who becomes security for costs in a cause, and which authorizes the issuing of an execution against the surety of a garnishee at the same time it is issued on a judgment against the garnishee, have all been held to be constitutional. The surety is in such case no more deprived of the right of trial by jury than if he had signed a power of attorney to confess judgment. He knows the law when he signs the obligation, and must be presumed to consent to whatever lawfully follows. The terms of the law are as much a part of his obligation as if they had been written in it. A statute authorizing summary process against delinquent tax collectors and their sureties is not an infringement of the fourth and fifth amendments of

> the Constitution of the United States, nor is it a violation of the State constitution prohibiting unreasonable searches and seizures of property without due process of law. A statute providing that a surety who has paid the debt may by motion recover a judgment for indemnity against his principal is constitutional. Also statute permitting judgment on motion against sureties on appeal bonds, after affirmance of the judgment. Also a statute authorizing a court of chancery to give a remedy by *scire facias* against the sureties on a receiver's bond."

In the case of Moore *vs.* Huntington, 17 Wall., 417, mentioned under division I of this brief, this court had under consideration a judgment affirmed by the Supreme Court of New Mexico against the appellant and the sureties on the appeal bond. The Supreme Court, in passing on the point under discussion, said (page 422):

> "The decree was rendered in the Supreme Court jointly against the defendants and their sureties in the appeal bond, and it is alleged for error that no such judgment could be rendered against the latter. But there is no error in this. It is a very common and useful thing to provide by statute that sureties in appeal and writ of error bonds shall be liable to such judgment in the appellate court as may be rendered against their principals. This is founded on the proposition that such sureties, by the act of signing the bond, become voluntary parties to the suit, and subject themselves thereby to the decree of the court."

The cases of Beall *vs.* New Mexico, 16 Wall., 535; Johnson *vs.* Chicago, &c., Elevator Co., 119 U. S., 388, and Hopkins *vs.* Orr, 124 U. S., 510, were all cases where this court upheld the validity of statutes permitting the entry of summary judgments against the sureties on appeal bonds, which statutes merely require that the surety should make good any judgment entered against the principal. In none of those cases did the surety expressly submit to the jurisdiction of the court and consent that judgment might be entered against

it, as was done in this case. If the surety, for a consideration satisfactory to itself, enters into such a contract expressly waiving its day in court and consents that a summary judgment may be entered against it, then it seems to us that it is not deprived of any constitutional right which it did not expressly, and for a valuable consideration, waive, and under these circumstances it seems to us, as was said in the case of Beall *vs.* New Mexico, there is no constitutional question involved.

For the reasons herein set forth, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

GEORGE E. HAMILTON,
JOHN W. YERKES,
JOHN J. HAMILTON,
Attorneys for Defendant in Error.

APPENDIX.

Sections of Code (D. C.) Referred to in This Case.

Sec. 454. The attachment shall be levied upon personal chattels by the officer taking the same into his possession and custody, unless the defendant shall give to the officer his undertaking, to be filed in the cause, with sufficient security, to the following effect, namely:

A. B., Plaintiff,
vs.
C. D., Defendant.

At Law, Numbered —.

The defendant and —— ——, his surety, in consideration of the discharge from the custody of the marshal of the property seized by him, upon the attachment sued out against the defendant on the — day of ——, Anno Domini nineteen hundred —, in the above-entitled cause, appear, and submitting to the jurisdiction of the court, hereby undertake, for themselves and each of them, their and each of their heirs, executors, and administrators, or successors or assigns, to abide by and perform the judgment of the court in the premises in relation to said property, which judgment may be rendered against all the parties whose names are hereto signed.

(Signed) C. D. [SEAL.]
E. F. [SEAL.]

Or unless the person in whose possession the property is attached shall give to the officer, to be filed in the cause, an undertaking in the following form or to the same effect, namely:

A. B., Plaintiff,
vs.
C. D., Defendant.

At Law, Numbered —.

Wheras, by virtue of an attachment issued in the above-entitled suit, the United States marshal for the District of Columbia has attached certain property in the hands of the undersigned E. F., as garnishee, namely (here describe) of the value of — dollars; and now, therefore, the said E. F. and G. H., as surety, appearing in said suit, and submitting to the jurisdiction of the court, hereby undertake for themselves and each of them, their and each of their heirs, executors, and administrators, to abide by the judgment of the court in relation to said property, and that if the same shall be condemned to satisfy the claim of the plaintiff, judgment may be rendered against all of the undersigned for the value of said property and costs, to be executed against them, and each of them, unless said property shall be forthcoming to satisfy the judgment of condemnation.

(Signed) E. F. [SEAL.]
G. H. [SEAL.]

And in either of said cases the attachment shall be sufficiently levied by the taking of the undertaking, as above provided for; and in the latter case the recital of the undertaking shall contain a sufficient description of the property and its value, which value shall be ascertained by an appraisement to be made under direction of the officer and returned with the writ.

SEC. 455. RELEASES.—Either the defendant or the person in whose possession the property was may obtain a release of the same from the attachment, after it has been taken into the custody of the marshal and the writ has been returned, by giving the undertaking required of him as aforesaid, with security to be approved by the court.

The plaintiff may except to the sufficiency of any undertaking accepted as aforesaid by the marshal and, if the ex-

ceptions be sustained, the court shall require a new undertaking, with sufficient surety, by a day to be named, in default of which he shall be liable to the plaintiff, on his official bond, for any loss sustained by the plaintiff through such default.

If the property attached be delivered to the defendant upon his executing an undertaking as aforesaid, and judgment in the action shall be rendered in favor of the plaintiff, it shall be a joint judgment against both the defendant and his surety or sureties in said undertaking for the appraised value of the property.

SEC. 460. WHO MAY DEFEND.—Any defendant, any garnishee, any party to a forthcoming undertaking, or the officer who might be adjudged liable to the plaintiff by reason of such undertaking being adjudged insufficient, or any stranger to the suit who may make claim, as hereinafter provided, to the property attached, may plead to the attachment; and such pleas shall be considered as raising an issue without replication, and any issue of fact thereby made may be tried by the court or by a jury impaneled for the purpose, if either party desires it.

SEC. 464. If in such action judgment is rendered in favor of the plaintiff against the defendant, and it shall appear that the plaintiff is entitled to a judgment of condemnation of the property attached, the court shall proceed to enter such judgment in the attachment as in the following sections directed.

SEC. 466. If, in any form of action, specific property has been attached and remains under the control of court, judgment of condemnation of the same shall be entered, and so much thereof as may be necessary to satisfy the demand of the plaintiff shall be sold under *fieri facias;* or if the said property shall have been sold under interlocutory order of the court, the proceeds, or so much thereof as may be necessary, shall be applied to the plaintiff's claim by order of the court.

SEC. 468. If the property attached has been delivered to or retained by a garnishee, upon his executing an undertaking as provided in section four hundred and fifty-four, judgment of condemnation of said property shall be rendered, as provided in section four hundred and sixty-six, and judgment shall also be entered that the plaintiff recover from the garnishee and his surety or sureties the value of said property, not exceeding the plaintiff's claim, said judgment to be entered satisfied if said property be forthcoming and delivered to the marshal, undiminished in value, within ten days after said judgment; otherwise, execution thereof to be had against said garnishee and his surety or sureties; and if said property shall be so delivered to the marshal the same shall be sold by him under *fieri facias* to satisfy said judgment of condemnation.

SEC. 479. UNDERTAKINGS.—An undertaking shall be understood to signify an agreement entered into by a party to a suit or proceeding, with or without sureties, upon which a judgment or decree may be rendered in the same suit or proceeding against said party and his sureties, if any, the said party and sureties submitting themselves to the jurisdiction of the court for that purpose. R